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REPORTS  
OF  
CASES ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
2889 F  
OF  
THE STATE OF MISSOURI.

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BY TRUMAN A. POST,  
REPORTER.

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VOL. XLV.

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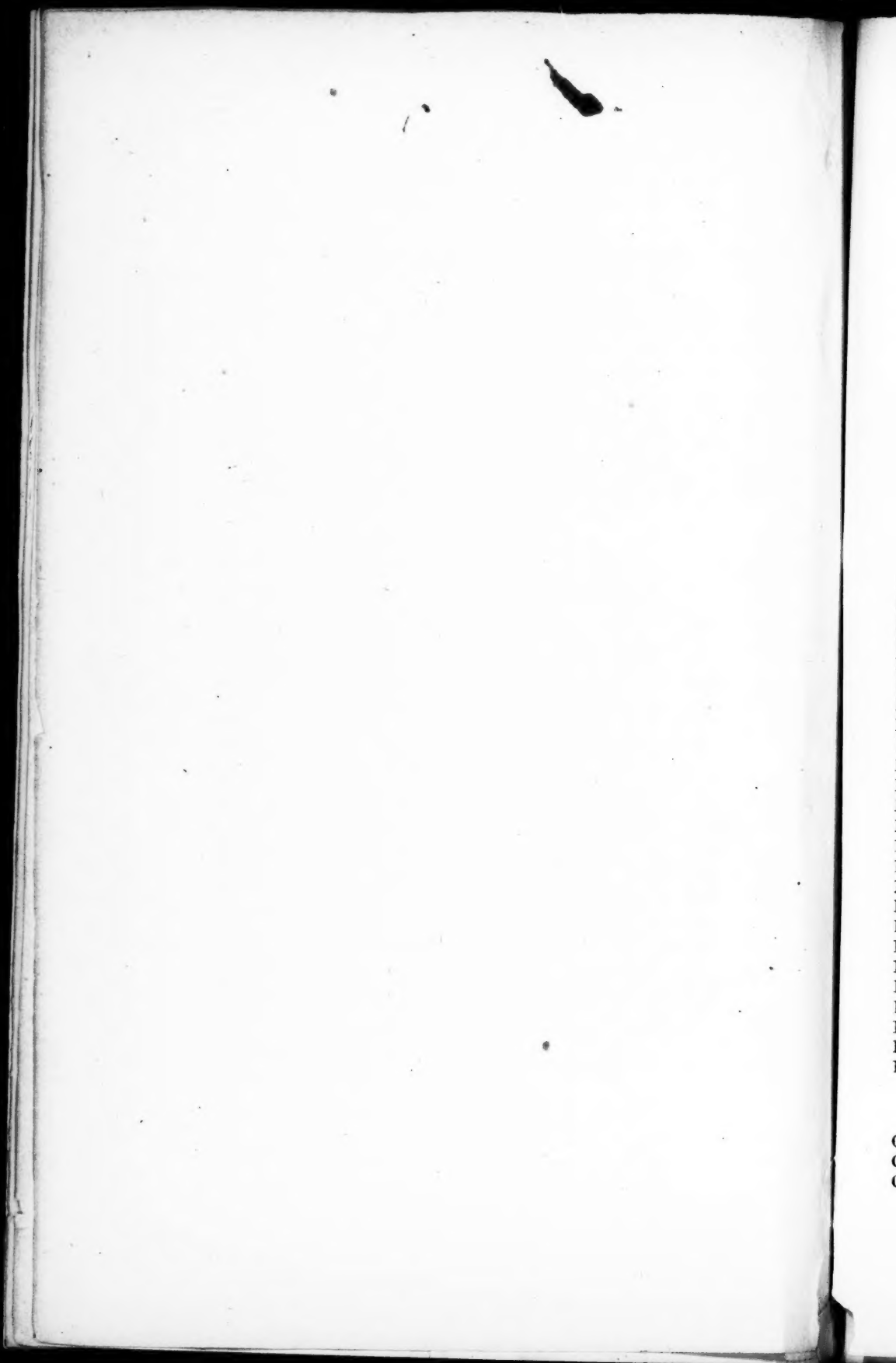
HON. DAVID WAGNER,  
HON. PHILEMON BLISS,  
HON. WARREN CURRIER, } *Judges.*

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N. C. BURCH, *Clerk at Jefferson City.*

WILLIAM M. ALBIN, *Clerk at St. Joseph.*

TRUMAN A. POST, *Reporter.*



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CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,  
OCTOBER TERM, 1869, AT ST. LOUIS.

[CONTINUED FROM VOL. XLIV.]

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STATE *ex rel.* WILLIAM H. READ, Plaintiff in Error, *v.* W. W.  
WEATHERBY *et al.*, Defendants in Error.

1. *Facts preliminary to order of County Court — Corporations — Towns, establishment of.*—In alleging the existence of a town created under chapter 41, Gen. Stat. 1865, it is not necessary to set out the existence of the facts on which the order of the County Court establishing the corporate existence of the town was founded. The court had jurisdiction of the subject, and the propriety and regularity of its action is to be presumed until the contrary appears.
2. *Quo warranto—Towns and townships—County Court, order of—Fraud.*—In *quo warranto* proceedings against persons for usurping the franchise of trustees of a town, under pretense that the inhabitants were a body corporate, under chapter 41, Gen. Stat. 1865, the only question to be determined is the legal existence or non-existence of the corporation. And where the order of the County Court establishing the town corporation is shown by the answer to be unobjectionable, a replication charging that the granting order was fraudulently procured by the applicants, is *dehors* the record and improper.
3. *Towns—Chapter 41, Gen. Stat. 1865, constitutional.*—Chapter 41, Gen. Stat. 1865, concerning towns, etc., is constitutional. (Kayser v. Bremer, 16 Mo. 88.)

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State ex rel. Read v. Weatherby et al.

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*Error to Sixth District Court.*

*Boulware & Reed*, for plaintiff in error, cited *The People v. Utica Ins. Co.*, 15 Johns. 387, 388; *Thompson v. The People*, 23 Wend. 567; *The King v. Leigh*, 4 Burrows, 2145 to 2147; Art. III, Const. Mo.; *People v. Wren*, 4 Scam. 269; *Sloan v. State*, 8 Blackf. 361; *Cheney v. Hosier*, 7 Mun. 334; *State v. McBride*, 4 Mo. 303; *Dartmouth College case*, 4 Wheat. 518.

*Carr*, for defendants in error, cited *Betts v. The City of Williamsburgh*, 15 Barb. 255; *Wood v. Peake*, 8 Johns. 69; 3 Hill. 243; *Griffith v. Bogart*, 18 How. 158; *Wyman et al. v. Campbell*, 6 Porter, 219; 9 Wend. 382; 8 Wend. 645; *Fry v. Bennett*, 5 Sandf. 54; *Garman et al. v. Lennox, Ex'r*, 15 Pet. 115; 4 Cranch, 333; 3 Cranch, 229; 12 Barb. 573; *State ex rel. Hequembourg v. Lawrence*, 38 Mo. 535; *Syme v. Steamboat "Indiana"*, 28 Mo. 335; *Kayser v. Trustees of Bremen*, 16 Mo. 88.

CURRIER, Judge, delivered the opinion of the court.

This is a proceeding in the nature of a writ of *quo warranto*. The information alleges that the defendants have "unlawfully usurped, and are now wrongfully holding and exercising the franchise of passing ordinances providing for the levy of taxes on the property of the inhabitants" of the town or village of Shelby, in the county of Shelby, under the false pretense that the "inhabitants of said town are a body politic and corporate, under and by virtue of the provisions of chapter 41" of the General Statutes of the State of Missouri; that the defendants are also, in like manner, unlawfully exercising the franchise of appointing persons to collect such taxes, etc., and prays that the defendants may be required to show by what authority of law these franchises are being exercised by them; that judgment of ouster may be awarded, a suitable fine imposed, and costs recovered. The return denies the alleged usurpations, but admits the doing of the specific acts charged; and then proceeds to allege that the defendants were therein in the lawful and proper exer-

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cise of the duties of "trustees of the inhabitants of the town of Shelby;" that the inhabitants of said town constitute a body politic and corporate, having been so "organized and established by virtue of an order of the County Court of said Shelby county, made and entered of record on the 5th of March, 1867;" that the defendants were duly appointed or elected trustees of the corporation thus constituted, and that they have since exercised the franchise in question, in virtue of the "authority thus conferred, and the authority contained in chapter 41 of the General Statutes." A demurrer to the return having been overruled, the relator replied, admitting that the Shelby County Court, March 5, 1867, entered on its records an order declaring the people of said town incorporated by the name of the "Inhabitants of the town of Shelby," and designating the metes and bounds of said corporation. The reply then proceeds to allege that the order aforesaid was fraudulently made and procured on the part of the applicants therefor, and of the court granting it; setting out the particulars of said supposed frauds, and showing, among other things, that the petition upon which the court acted in granting the order and entering it of record, was not, as the law required it should be, signed by two-thirds of the taxable inhabitants of said town. This is substantially the state of the pleadings. On the trial the relator offered evidence tending to prove the facts averred in the reply. This evidence was objected to and excluded on the ground that the order of the Shelby County Court, declaring the inhabitants of the town of Shelby a body politic and corporate, was judicial in its character, and that until annulled it was conclusive of the existence of the facts required to be shown as a condition to the grant of the order; and for the further reason that the facts offered to be proved could alone be inquired into upon a proceeding against the inhabitants of the town in their corporate name.

1. The demurrer to the return was properly overruled. It was not necessary, in alleging the existence of the corporation, to set out the facts preliminary to the grant of the order, and upon which the order was founded. (12 Barb. 573.) The order, and not the antecedent facts, brought the corporation into being.

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The presence of these facts is to be presumed from the fact of the order until the order itself is attacked and overthrown. The court had jurisdiction of the subject, and the propriety and regularity of its action is to be presumed until the contrary appears. Its finding and judgment in the premises, until set aside, must be deemed conclusive of the main fact here sought to be drawn in issue. This principle is applicable to the acts and judgments of all courts of record having jurisdiction of the subject matter of such acts or judgment. (See *Kayser v. Trustees of Bremen*, 16 Mo. 88; *Betts v. Williamsburgh*, 15 Barb. 255; 1 Greenl. on Ev., part 3, ch. 5.)

2. The question of the existence or the non-existence of the supposed corporation was put directly in issue by the pleadings, and, in my opinion, properly. The information alleges, and it proceeds throughout upon the theory, that there was no such corporate existence as the defendants claim. The inquiry whether there was such a corporation, was not collateral, but primary and direct. It is not charged that the defendants intruded into an office, but that they usurped a franchise—no corporation, and, consequently, no corporate office existing. In England a franchise is concisely defined to be a “royal privilege in the hands of a subject.” In this country it is defined as a privilege of a public nature, which can not be exercised without a legislative grant. With us, therefore, the wrongful assumption of powers, which can alone be rightfully exercised when granted by the sovereign authority, is a violation of a sovereign franchise. (Ang. & Am. on Corp. 697.) The violation of such sovereign franchise is precisely what the defendants are charged with doing. They admit the assumption of the powers, but aver the grant of authority. In other words, they allege the existence of the corporation (which the relator denies), and that they are legal officers of that corporation, and that as such they exercise the franchise in question. The controversy turns wholly upon the question of the existence or non-existence of the alleged corporation. The replication itself admits that existence *de facto*, and *de jure* as well, for it admits the order calling the corporation into being. That order is spread upon the records of the

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County Court of Shelby county. It is regular upon its face, and is *prima facie* evidence, at least, that the inhabitants of the town of Shelbina are a body politic and corporate. The record is unobjectionable upon its face, and the relator seeks to attack the corporation for matters *dehors* the record—matters *in pais*. He shows, in a word, that an existing institution had its origin in fraud, and that it ought not, therefore, longer to continue. But this position is fatal to the theory and allegations of the information. This is not the Vernon county case at all. (State *ex rel.* Douglass v. Scott, 17 Mo. 521.) There the supposed corporation never had even a *prima facie* existence. The act which proposed to establish the new county was held unconstitutional and void. It was a nullity from the beginning; it was as though no such act had ever been passed. Not unlike this is the case from Massachusetts (Commonwealth v. Bowler, 10 Mass. 295). Both cases sustain the theory of the relator's information; but the theory of the information and the facts stated in the replication are in conflict, and can not stand together. If the pleadings and evidence offered affirmed the proposition that no corporation existed, either *de facto* or *de jure*, then the relator would be entitled to judgment. But facts which go to show simply that the corporation never ought to have existed, do not sustain the allegations that it never did exist. Where one of these minor municipal corporations, contemplated by the statute, is found in apparent legal existence and operation, the order of court establishing it regular and proper upon its face, the holding of it to be a mere nonentity because of matters antecedent to the order, could not fail to be unjust and mischievous in its effects upon innocent and morally unoffending parties. It is true that these inconvenient consequences do not determine the state of the law. It is proper to take them into consideration, however, as an inducement to cautious and circumspect judicial action.

3. But the relator insists that the statute (Gen. Stat. 1865, ch. 41) providing for the incorporation of towns, under which the Shelby County Court acted, is unconstitutional and therefore void, and consequently that the order of the County Court based



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on that statute is, upon its face, void and of no effect. This enactment, substantially in its present form, has been upon the statute books of the State for some forty years. Its operation has been useful and beneficent, and its provisions are in harmony with the policy of American legislation on the subject therein embraced; and, what is more to the purpose, the constitutionality of the enactment has been passed upon and definitely settled by a prior adjudication of this court. The point was distinctly made and clearly adjudicated in *Kayser v. Bremen*, 16 Mo. 88. We are satisfied with that decision and have no disposition to disturb it.

The other judges concurring, the judgment of the court below is affirmed.

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JOSEPH H. MCPHEETERS, Respondent, v. THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Appellant.

1. *Damages—Railroad companies—Cow, killing of—Petition—Allegation of negligence, sufficiency of.*—In a suit for damages against a railroad company for killing a cow, the allegation that the act was done carelessly and negligently was sufficient and showed a good cause of action.
2. *Damages—Railroad companies—Injuries—Towns—Public crossings.*—Where an injury, caused by a railroad train, occurred at a public crossing in the streets of a town, no recovery could be had without proof of actual negligence.
3. *Damages—Negligence—Jury.*—The question of negligence is peculiarly and exclusively for the jury to determine.
4. *Practice, civil—Evidence—Verdict—Instructions.*—When there is any evidence to sustain a verdict, the Supreme Court will not interfere.
5. *Damages—Railroad companies—Negligence—Cattle inclosures.*—The doctrine that the owner of cattle is obliged to keep them on his own premises, and that if they stray therefrom they are trespassers and the owner is guilty of negligence, has never been the law of this State. (*Gorman v. Pacific R.R. Co.*, 26 Mo. 441.)
6. *Damages—Negligence, gross negligence, meaning of terms.*—*Semble*, that in law there is no difference between negligence and gross negligence, the latter being nothing more than the former, with the addition of a vituperative epithet.
7. *Practice, civil—Instructions offered out of time, properly refused.*—An instruction offered by counsel, after the commencement of the argument to the jury, is properly refused by the court.



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*Appeal from Sixth District Court.*

*Carr*, for appellant.

I. The petition simply alleges a legal conclusion. It does not comply with the practice act (Gen. Stat. 1865, ch. 165, § 3, p. 658). It should allege wherein the appellant was guilty of carelessness and negligence. (*Sugg v. Blow*, 17 Mo. 359.)

II. The second instruction given to the jury at the request of the respondent does not embrace the defense raised by the evidence on behalf of the appellant. (*Brightman v. Eddy*, 97 Mass. 478; *Denny v. Williams*, 5 Allen, 1; *Halloran v. New York & Harlem R.R. Co.*, 2 E. D. Smith, 257; *People v. Cook*, 8 N. Y. 67, 72-5; *Smith v. Hann. & St. Jo. R.R. Co.*, 37 Mo. 287; *Clark's Adm'r v. same*, 36 Mo. 217; *Sawyer v. same*, 37 Mo. 70; *Pittsburgh & Connellsville Railroad Company v. McClurg*, 56 Penn. 294.)

III. Railroad companies are not required to fence in cities and towns, nor at the crossing of public highways, and are not liable unless guilty of gross negligence. (*Bowman v. The Troy and Boston R.R. Co.*, 37 Barb. 516; *Vanderkar v. Rensalaer and Saratoga R.R. Co.*, 13 Barb. 390; *Parker v. same*, 16 Barb. 315; *Halloran v. New York & Harlem R.R. Co.*, 2 E. D. Smith, 257; *St. Louis, Alton & T. H. R.R. Co. v. Linden*, 39 Ill. 433; *The Indianapolis & Cincinnati R.R. Co. v. Kenney*, 8 Ind. 402; *same v. Oestel*, 20 Ind. 231; *The Illinois Central R.R. Co. v. Reedy*, 17 Ill. 580; *Railroad v. Skinner*, 19 Penn. 298; 1 Bedf. 480, and authorities cited; *id.* 500, and authorities cited; 2 Zab. 185; 2 Metc. 177.)

*Redd & McCabe*, for respondent, cited *Gorman v. Pacific Railroad*, 26 Mo. 445; *Burns v. The Housatonic Railroad Co.*, 2 Am. Railway Cases, 117.

WAGNER, Judge, delivered the opinion of the court.

The first question which will be considered is the motion in arrest, made by the appellant, which brings up the sufficiency of the petition. The action was for negligently killing a cow by the

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locomotive and train on appellant's road, at a public crossing within the corporate limits of the city of Palmyra. The averment in the petition is that the "defendant, by its servants and agents, carelessly and negligently, caused one of defendant's locomotives, with a train of cars attached thereto, to strike a milch cow, the property of plaintiff," &c. The allegation is that the act was done carelessly and negligently, and that is sufficient. Negligence is a question of fact, and, under a general averment of negligence in running a train and causing an injury to be done, it is competent to introduce any testimony having a tendency to support the charge.

It has been expressly decided in this court, that a petition against a railroad company, which states that the defendant, while running its locomotive, etc., negligently struck the cattle of the plaintiff, etc., shows a good cause of action at common law. (*Garner v. Hann. & St. Jo. R.R. Co.*, 34 Mo. 235; see also 3 Tiff. & Sm. Pr. 88.) The petition was, I think, sufficient, and the court therefore committed no error in overruling the motion.

As the injury occurred at a public crossing, in the streets of a town, and not where it was incumbent on the company to erect a fence, there could be no recovery without proof of actual negligence. (*Meyer v. N. M. R.R. Co.*, 35 Mo. 352.) But the question of negligence is peculiarly and exclusively for the jury to determine, and it is hardly necessary to again repeat what has been so often held by this court, that if there is any evidence to sustain the verdict we will not interfere. It is true the employees of the railroad swore that there was no negligence, but what weight or credibility should be attached to their testimony was for the jury, who heard them detail their evidence and could form a much more accurate opinion than we could pretend to. It is admitted on all sides that the train was running at full speed at the rate of ten or twelve miles an hour, the usual speed of freight trains, and it is questionable whether such a rate at a public crossing in a town, where people are continually traveling and stock crossing, ought not of itself to be held negligence. At any rate, this, in connection with other circumstances, was

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proper for the consideration of the jury, and from which they might reasonably infer negligence.

So far as the evidence is concerned, there is nothing calling for the revisory action of this court, and the only question is whether there was any error in the instructions. The plaintiff asked, and the court gave, but two instructions at his request. The first declared that the defendant, its servants and agents in the control of its train were bound to use reasonable care and diligence in the management of its train to avoid doing injury to stock in the crossing of public streets and highways. The second directed the jury that if they believed, from all the facts and circumstances proved in evidence, that the defendant, its servants and agents, could, by the use of reasonable care and diligence, have avoided injuring the plaintiff's cow, they ought to find a verdict for the plaintiff.

The court, on motion of the defendant, gave the following instruction: "The defendant is not liable for damages for the injury or killing of horses, cattle or other animals, by one of its locomotives, engines or cars attached to it on the crossing of the public street in a city or town, unless the employees or agents conducting and managing such locomotive engine or cars attached to it were guilty of negligence."

I see nothing objectionable in the instruction of the plaintiff, but when coupled with the one given for the defendant, the whole law applicable to the case was fully and fairly submitted, and there was no ground left for complaint. Defendant further asked the court to instruct the jury that if the plaintiff voluntarily suffered his cow to go at large in the public streets, with no one to take charge of her, and to stray upon the track at a time when cars were passing, then he was guilty of carelessness, and could not recover for injuries done to the cow, unless such injuries were occasioned through the gross negligence of the agents and employees conducting and managing the locomotive and train. This instruction the court very properly refused. It is the law in England, and in some of the densely populated States in this Union, that the owners of cattle shall keep them inclosed, and if they stray therefrom they are trespassers, and the owners are

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guilty of negligence. But such is not, and never was, the common law in Missouri.

It is opposed to the policy of the State in its present condition, and whenever it has been attempted to be enforced, it has met with resistance and condemnation. The question was elaborately considered in *Gorman v. Pacific Railroad*, 26 Mo. 441, and it was there held that the owner of cattle is under no obligation to keep them on his own premises.

The counsel for the appellant seems to lay great stress on the assumption that gross negligence should be proved before the defendant could be held liable. The word "gross" has been frequently used by judges in discussing this question, but I deem it wholly unnecessary. In England, it is now the course of adjudication, and definitely decided, that there is no difference between negligence and gross negligence, the latter being nothing more than the former, with the addition of a vituperative epithet. (*Gill v. Iron Screw Collier Co.*, 12 Jur. N. S. 727.) The question is actual negligence, and if the jury found that it is sufficient. Further complaint is made that the court refused the fifth and last instruction asked for by the appellant, because it was offered out of time. The court has a standing rule that all instructions shall be submitted and passed upon before the argument of counsel commences. The other instructions were all passed upon and the respondent's counsel was addressing the jury, when the appellant desired the last instruction to be given. There was nothing wrong in the action of the court; the rule was proper enough, and that it was adhered to and enforced is not a matter for our intervention. But were it otherwise, it would make no difference in the final disposition of this cause, as the instruction was wholly useless, the substance of it having been previously given. There is no error in this record, and I advise the affirmance of the judgment.

Judgment affirmed. The other judges concur.

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The State of Missouri ex rel. Benne, relator, v. Engleman.

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THE STATE OF MISSOURI *ex rel.* SATURNE BENNE, Relator, *v.*  
EDWARD D. ENGLEMAN, Clerk of the Cape Girardeau Court of  
Common Pleas, Respondent.

1. *Practice, Civil—Appeal to District Court—Bond—Mandamus—Writ of error.*—The Cape Girardeau Court of Common Pleas granted an appeal to the Second District Court, with the proviso that no transcript should be made out until the filing of the bond. *Held*, that such proviso was unwarranted; but the clerk, acting under the direction of the court, properly refused to issue the transcript in default of bond, and *mandamus* would not lie against him to compel its issue. The proper remedy of appellant in such case would be writ of error.

*Petition for mandamus.*

*Ledergerber, Colcord, Brown, and Russell*, for relator.

That portion of the order granting an appeal containing a condition precedent thereto, is without the authority of law—is a nullity, and void. It could not excuse the plain statutory duty of the clerk, and is not, therefore, a prohibition—is no justification.

*Davis & Brown*, for respondent.

CURRIER, Judge, delivered the opinion of the court.

This is a petition for a *mandamus* upon the defendant, requiring him to make out and file with the Second District Court a copy of the record of proceedings in a cause pending in the Cape Girardeau Court of Common Pleas, wherein an appeal is alleged to have been granted—or show cause for not doing so. The relator was the appellant in that suit. The defendant here was clerk of the court, and declined furnishing the required transcript; and shows, in justification of his refusal, that he was therein acting in strict conformity with the order of the court, of which he was the servant and clerk.

The court, in granting the appeal in question, incorporated in the order allowing it a provision that no transcript should be made out until the appellant should file with the clerk an appeal bond. In other words, it made the filing of the bond a condition to the appeal becoming practically effectual. The appellant filed

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no bond, and the clerk, in accordance with the order and direction of the court, withheld the transcript.

That part of the order which required the filing of the bond, as a condition to the issuance of the transcript, was wholly unwarranted. The court, nevertheless, had jurisdiction of the cause and the parties, and its errors, however gross, are not to be corrected by an appeal to the clerk. Nor ought the clerk to be subjected to the payment of bills of cost as a consequence of his fidelity to the court and its orders, or to be placed in an attitude of disobedience and contempt by action contravening the order of the court.

The order was wrong; but the relator had a ready remedy through the agency of a writ of error, which would have taken up the record as effectually as an unconditional appeal. There was no necessity of a resort to *mandamus*.

The peremptory writ is therefore refused; the other judges concurring.

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DENNIS McDONALD and FRANCES V. McDONALD, Respondents,  
v. FREDERICK GRONEFELD, Appellant.

1. *Executions—Act March 23, 1863—Fresh levies after return day, effect of.*—Where an execution was levied, prior to the return day thereof, on certain property, it would not continue in force, under the act of March 23, 1863 (Sess. Acts 1863, p. 20, § 2), for the purpose of a fresh and independent levy on other property after the return day of the execution. Under that act the execution would afterwards be dead for all purposes, except the preservation of rights which attached prior to the return day by virtue of the antecedent levy.

*Appeal from Sixth District Court.*

*Lewis & Bruere*, for appellant.

*Orrick & Emmons*, and *Lackland*, for respondents, cited *Bank of the State of Missouri v. Bray et al.*, 37 Mo. 194; *Newman v. Hook*, 37 Mo. 207; *Turner v. Kellar*, 38 Mo. 332; *Lackey v. Lubke*, 36 Mo. 115; *Merchants' Bank of St. Louis v.*



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Harrison, 39 Mo. 433-4; Swift's Dig. 795; Gantly v. Ewing, 15 Curtis' U. S. 608 *et seq.*; Williams v. Amory, 14 Mass 28-9; Litchfield v. Cudwell, 15 Pick. 27-8; Breese v. Bange, 2 E. D. Smith, 474; Russell v. Dyer, 40 N. H. 173; McElwee v. Sutton, 2 Bailey, 361.

CURRIER, Judge, delivered the opinion of the court.

This is an ejectment. The plaintiff Frances V. McDonald, the wife of the other plaintiff, deduces her title through George G. Johnson, who purchased the premises in suit at sheriff's sale, on execution against the plaintiff Dennis McDonald. The defendant deduces title through Benj. H. Payne, who also purchased the same premises at sheriff's sale, on executions against the same party. Dennis McDonald is, therefore, the common source of title. Deeds were duly executed in pursuance of these respective sales; the sale and conveyance to Payne being prior to the sale and conveyance to Johnson. It is conceded that if the deed to Payne is valid, the defendant has the title; but if this deed is invalid, then the title is conceded to be in McDonald.

The validity or invalidity of that instrument depends upon a solution of the question whether or not the executions under which the premises were sold to Payne were, at the time of the levy of them upon the particular property in dispute, in life and of force for the purposes of that levy, and the subsequent sale pursuant thereto.

These executions were issued in February, 1863, and were made returnable at the next succeeding term of the St. Charles Circuit Court, which was held in March of that year. Prior to the return day, they were levied upon several tracts of land of the defendant therein (Dennis McDonald), but not upon the tract in suit. The land thus levied upon was advertised for sale at the March term of the St. Charles Circuit Court, but the sale was postponed by agreement of parties. In August of the same year the property was readvertised for sale at the then next succeeding term of the court, and this advertisement contained a description of the property sued for in this action, which on the day of sale, was sold and bid in by Payne, as already suggested. The execu-

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tions in question, as respects the land in suit, had expired by their own limitation, and became *functus officio*, long prior to their levying upon that particular parcel of land, unless they were kept alive and continued in force by the operation of the act of March 23, 1863. (See Acts 1863, p. 20, § 2.) There is no contest over this proposition. (Bank of Missouri v. Bray, 37 Mo. 194.) The determination of the question presented depends, therefore, upon the construction to be given to that enactment. The second section is relied on. It provides that "executions now issued, or that may be hereafter issued from any court of record, and levied upon real estate, if from any cause the real estate shall not be sold at the next term of the court from which said execution has been issued, or may hereafter be issued, said execution and the lien of said levy shall remain and continue in full force until a term of court is held in the county where said property may or can be sold."

The historical fact and circumstances which induced this legislation were the same as those which occasioned the act of March 17, 1863 (Sess. Acts 1863, p. 24, § 1), extending the lien of a judgment from three to five years. These acts were passed within five days of each other, and arose out of a disturbed and abnormal condition of society. Property was depressed and courts were, in various localities, broken up. Sales could not be effected because the courts were closed. Therefore the liens of judgments and those created by levy of execution were extended primarily for the protection of the rights of creditors, but subordinately to avert an unnecessary sacrifice of the property of debtors. These acts are to be construed in the light of contemporaneous history, and with a view to the accomplishment of the objects intended by them.

But for the act of March 23, the levy of an execution after the return day therein specified, that is, after the execution had spent its force and become *functus officio*, would be utterly void and of no effect. (37 Mo. 194, *supra*.) In what way does the act affect the question of the original levy? Evidently in no way at all. It provides simply that where a levy has once been made, by which must be understood a legal and valid levy prior to the



return day of the execution, there the "lien" thereof shall be protected and continued, although the sale shall not be had at the next term of the court; and further, that for the purpose of making the lien, created by the levy and continued by the statute, practically effectual for the purpose intended, the execution under which the levy was made should also be continued in force, not only till the next succeeding term, but until a term when the property levied upon "may be sold." (*Stewart v. Sevérance et al.*, 43 Mo. 322.) The sole object of continuing the execution in life was to work out beneficially to the execution creditor an existing lien, created by a levy prior to the return day of the execution. The statute has this extent and no more. It does not enter into the policy or objects of the law to authorize fresh levies upon executions already dead for all purposes, except the preservation and protection of rights which attached prior to the return day of the execution in virtue of the antecedent levy. The opposite construction is technical, and spends its force upon the letter and mere grammar of the act, overlooking the evil intended to be guarded against, and the remedy intended to be applied.

In the case of the Bank of the State of Missouri v. Bray, already cited, the court held that the second section of the act of 1863, in relation to executions, and the 54th section of the act of 1855 (R. C. 1855, p. 748), had reference only to cases where levies had been duly made on valid subsisting executions; that is, where a levy had been made prior to the return day of the execution. The principle of this decision is applicable to the case at bar. The only point of distinction between the two cases consists in this, that in the bank case no levy at all had been made prior to the return day of the execution, whereas here a levy had been made prior to that day, but not upon the property in suit, but upon other property. According to the construction contended for by the defendants, the levy made prior to the return day upon other property might have been subsequently abandoned, and still the execution would have continued in force for the purposes of a fresh and independent levy, although it would have ceased to have legal vitality but for the first levy.

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Meyer v. Evans et al.—McDonald et al. v. Freese.

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The act in question, in my opinion, does not admit of this construction, and the judgment, with the concurrence of the other judges, will be affirmed.

ANTON MEYER, Plaintiff in Error, v. EVANS & HOWARD, Defendants in Error.

1. *Practice, Civil—Assignment of errors—Judgment affirmed, when.*—When plaintiff in error neglects to file an assignment of errors, and no cause for the omission is shown, the judgment of the court below will be affirmed.

*Error to St. Louis Circuit Court.*

*Jecko & Hospes*, for plaintiff in error.

*Glover & Shepley*, for defendants in error.

WAGNER, Judge, delivered the opinion of the court.

The counsel for the defendants in error move the court to affirm the judgment in this cause, because the plaintiff in error has failed to assign errors, as required by law.

No reason appearing for the failure, the motion will be sustained and the judgment affirmed. The other judges concur.

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DENNIS McDONALD, *et al.*, Respondent, v. JOHN H. FREESE, Appellant.

1. *Dennis McDonald et al. v. Gronefeld, ante*, p. 28, affirmed.

*Lewis & Bruere*, for appellant.

*Orrick & Emmons*, and *Lackland*, for respondent.

CURRIER, Judge, delivered the opinion of the court.

This is an ejectment suit, and involves substantially the same issues and points of law as the case of the same plaintiffs against Frederick Gronefeld, decided at the present term of the court. That decision determines this cause, and the judgment must therefore be affirmed, the other judges concurring.

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State of Mo. v. Macklin.—Goodman et al. v. Hann. & St. Jo. R.R. Co.

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STATE OF MISSOURI, Respondent, *v.* PATRICK MACKLIN, Appellant.

1. *Practice, Civil — Supreme Court — Judgment affirmed, when.*—Where respondent presents to the Supreme Court a transcript of the record, and it appears therefrom that the appeal was taken more than thirty days before the commencement of the term, and no steps have been taken to prosecute the appeal, the judgment of the lower court will, on motion, be affirmed.

*Appeal from St. Louis Court of Criminal Correction.*

*W. C. Huffman*, for appellant.

*J. P. Colcord*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The respondent now comes and presents to this court a transcript of the record, and asks for an affirmance of the judgment rendered in this cause. It appears that the appeal was taken on the 24th day of May, 1869, and no steps have been pursued to prosecute it by the appellant. The motion will therefore be sustained and the judgment affirmed.

Affirmed. The other judges concur.

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CHARLES GOODMAN *et al.*, Respondents, *v.* HANNIBAL & ST. JOSEPH RAILROAD COMPANY, Appellant.

1. *Land and land titles — Leases — Fixtures — Removal of, agreement concerning.*—Where a building is erected by one person on the land of another by his permission, upon an agreement or understanding that it may be removed at the pleasure of the builder, it does not become a part of the real estate, but continues to be a personal chattel and the property of the person who erected it.
2. *Landlord and tenant — Injunction — Chattels, removal of.*—Where the landlord, before the expiration of the term, enjoins the tenant from removing the chattels or fixtures, the tenant will be allowed a reasonable time after the dissolution of the injunction within which to demand and remove the same.

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Goodman et al. v. Hann. & St. Jo. R.R. Co.

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*Appeal from Sixth District Court.*

This was a suit against the Hannibal & St. Joseph Railroad Company to recover possession of a lot in the town of Shelbina, in Shelby county, Missouri. Defendant's answer admitted plaintiff's ownership of the lot and title to the possession, but alleged that the railroad company was owner of a certain building standing on the premises, and held and occupied it by the permission and license of one John L. Lathrop, plaintiff's grantor, and that plaintiff purchased the lot with full knowledge of defendant's rights to the house. The company claimed to hold the premises as tenant at will and to have a lawful right to remove the house before delivering possession of the lot to the plaintiff. The case went up on demurrer. For facts pertinent to the issues decided, see also the opinion of the court.

*Carr*, for appellant, cited *Dame v. Dame*, 38 N. H. 429, and the authorities there cited; *Desloge et al. v. Pierce et al.*, 38 Mo. 588; *Fisher v. Dean*, 26 Mo. 116; *Bircher v. Parker*, 40 Mo. 118; *Renick v. Kern*, 14 Serg. & R. 267; *Wells v. Banister*, 4 Mass. 514; *Osgood v. Howard*, 6 Greenl. 452; *First Parish in Sutbery v. Jones et al.*, 8 Cush. 190; Gen. Stat. 1865, chap. 189, § 13; *Ridgeley v. Stillwell*, 25 Mo. 570, and 28 Mo. 400; *Doty v. Gorham*, 5 Pick. 487; *Murray v. Armstrong*, 17 Mo. 209.

*Shafer & York*, for respondents.

WAGNER, Judge, delivered the opinion of the court.

The case was decided in the court below on demurrer to the defendant's answer. There was no error in sustaining the demurrer, but if the answer is true, the house is a simple personal chattel, and the defendant is clearly entitled to remove it. It is well settled that where a building is erected by one man upon the land of another, by his permission, upon an agreement or understanding that it may be removed at the pleasure of the builder, it does not become a part of the real estate, but continues to be a personal chattel, and the property of the person

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who erected it. (Dame v. Dame, 38 N. H. 429; Van Ness v. Packard, 2 Pet. 137; Taylor on Land. and Ten. § 546.)

And where the landlord, before the expiration of the term, enjoins the tenant from removing the chattel or fixtures, the tenant will be allowed a reasonable time after the dissolution of the injunction within which to demand and remove the same. (Bircher v. Parker, 40 Mo. 118.)

Defendant admits that the title to the lot is vested in plaintiffs, and that they are entitled to the possession thereof. The answer therefore constituted no defense against acquiring the possession, but that would not operate as an impairment of the right of the defendant to remove the building within a reasonable time. For aught that appears the fixtures would have been removed before the dispossession of the defendant, had no restraint been used.

Judgment affirmed. The other judges concur.

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SAMUEL MCCARTNEY'S ADMINISTRATRIX *et al.*, Respondents, v.  
B. A. ALDERSON and CHARLES BRUERE, Appellants.

1. *Forcible entry and detainer*—Section 36, chap. 187, Gen. Stat. 1865, construction of.—A. claimed title to certain land by virtue of the possession of B., his grantor, but never had possession himself. Held, that section 36, chap. 187, Gen. Stat. 1865, concerning suits for forcible entry and detainer, by heirs, devisees, grantees, etc., of persons dispossessed under the statute, was not intended to apply to such cases. The heirs, etc., have no greater rights than the ancestor, if living, or the vendor, if he had not sold, could have had. The defendant must still be found guilty of actual dispossession. The object of the statute was not to change the rights or liabilities of the parties, but, when they had accrued, to provide that they should not lapse by death or sale.
2. *Forcible entry and detainer*—Meaning of terms "disseizin" and "lawfully possessed."—The statute concerning forcible entry and detainer (Gen. Stat. 1865, ch. 187) is a possessory action merely. The term "disseizin," as therein used, implies actual dispossession. The term "lawfully possessed" does not involve an inquiry into the lawfulness of the possession as regards title, but only in regard to the mode of obtaining it, and is equivalent to "peaceably possessed." In actions under this statute, proof of title in plaintiff, with payment of taxes and acts of ownership merely, is not evidence of peaceable possession.

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3. *Forcible entry and detainer—Possession of a portion of premises, with title to the whole, effect of.*—The possession of a portion of the premises in dispute carries the possession of the whole, if the title covers the whole.
4. *Forcible entry and detainer—Landlord—Disseizin of tenant.*—The landlord has no such possession as will enable him to complain of a disseizin of his tenant.

*Appeal from Sixth District Court.*

*Lewis & Bruere*, for appellants, cited *Wood v. Dalton*, 26 Mo. 582; *Pentz v. Kuester*, 41 Mo. 450; *Burns v. Patrick*, 27 Mo. 434; *Reed v. Bell*, 26 Mo. 218.

*Lackland & Alexander*, for respondents, cited Gen. Stat. 1865, ch. 187, § 36; *Garrison v. Savignac*, 25 Mo. 47; *Bernecker v. Miller & Miller*, 40 Mo. 473; *Goerges v. Hufschmidt*, 44 Mo. 179; *Bartlett v. Draper*, 23 Mo. 409; *Spalding v. Mayhall*, 27 Mo. 380; *King's Adm'r v. St. Louis Gas Company*, 34 Mo. 304; *Keyser v. Rawlings*, 22 Mo. 126, 136; *Draper v. Shoot*, 25 Mo. 203-4; *Menkens v. Ovenhouse*, 22 Mo. 70; *Williams v. Dougan*, 20 Mo. 186; *Johnson v. Prewitt*, 32 Mo. 554; *Carondelet v. Simon*, 37 Mo. 408.

BLISS, Judge, delivered the opinion of the court.

This was an action for wrongful disseizin and detainer of a vacant town lot in St. Charles, tried on *certiorari*, in the St. Charles Circuit Court, where the plaintiff obtained judgment, which judgment was affirmed by a divided opinion of the District Court.

It appears that some fifteen years since, McCartney purchased of one Ellen Taylor two adjoining town lots in St. Charles, and that both lots were embraced in the same deed. Upon one of them was a house which had been occupied by Mrs. Taylor, but it does not clearly appear that McCartney ever has had actual possession—at least, he has not had for many years. Upon the trial, the plaintiff claims to have proved that, at the time of the disseizin, one Anna Goerges was in possession of the house as his tenant, but she had no control of the other lot, which is the one in controversy. It is undisputed that this lot is uninclosed, and, at



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the time of entry by defendants, was not in the actual possession or occupancy of any one. They took possession without force, and fenced it, claiming title from the school directors of St. Charles. It is not claimed that this lot had been ever actually occupied since it was purchased by McCartney, although it is in evidence that he paid taxes upon it, and other "acts of ownership" are spoken of, but it does not appear what they were.

The principal question that arises in this case, and the one upon which turns the plaintiff's right to recover, is that of possession. The suit was commenced before the death of McCartney, and the defendants claim that he had no such possession of the lot in controversy as would warrant this action. The law is correctly given in several of the instructions to the jury, but they are all qualified by the third, which gives the views of the court as to what constitutes possession. It is as follows: "3. If it appear, from the evidence, that the premises fenced up by the defendants was a part of the lot described in the deed from Ellen Taylor to Samuel McCartney, and that said part, so fenced up by defendants, was included in the limits of the lot described in said deed, and that on the lot so described in said deed there was a house or other improvements, and that the plaintiff paid the taxes on said lot, including the portion fenced up by defendants, and exercised acts of ownership over the same for a long time before, and up to the time the fence was put there by defendants, then the plaintiff, Samuel McCartney, has such possession of the portion fenced up by defendants as will enable him to maintain this action."

This instruction, taken in connection with the evidence, seems to involve three legal propositions—it certainly does involve two of them: first, that the possession of Ellen Taylor, from whom McCartney purchased, was sufficient, so far as possession is required, to enable him to bring this action; second, that no actual possession is necessary, but that paying the taxes and exercising acts of ownership are sufficient; and, third, that the possession of a portion of the premises, to-wit: the house, carries with it the possession of the adjoining lot. I understand

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the well-written opinion of a majority of the judges of the District Court to sustain each of these propositions.

If McCartney is able to avail himself of the possession of those from whom he claims title, it must be by virtue of section 36, chapter 187, Gen. Stat. 1865, which reads as follows: "Heirs, devisees, grantees, and assigns of any lands, tenements, or other real possessions, shall be entitled to the same remedies against persons who were guilty of forcible entry and detainer, or of unlawful detainer of such land, tenements, or other real possessions, before the descent, devise, grant, or assignment thereof, as the ancestor, deviser, grantor, or assignor was entitled to by virtue of this chapter."

This section was incorporated into our system in 1865, and to remedy a great inconvenience. This action may be brought at any time within three years of dispossession, but if in the meantime the person dispossessed should die or sell his property, the remedy, as the law before stood, ceased. The heir, grantee, etc., could not sue, because they had not been dispossessed, and must resort to ejectment. Hence it is now provided that they, too, may sue, and without personal dispossession. But have they any greater rights than the ancestor, if living, or vendor, if he had not sold, would have had? Must not the defendant still be found guilty of actual dispossession? The object of this amendment was not to change the rights or liabilities of the parties, but, when they had accrued, to provide that they should not lapse by death or sale. Hence the provision that the entry and detainer must be "before the descent, devise," etc. In the case before us, the entry of defendants was more than ten years after the possession of McCartney's vendor; so it is perfectly clear that he can not avail himself of that possession.

Upon the second proposition, regarding the plaintiff's possession, we regard the law as well settled. This is a possessory action merely; the title can not be inquired into. The term "disseizin," in the statute, is not used in its ancient technical sense, but implies actual dispossession. (*Warren v. Ritter*, 11 Mo. 354; *Spalding v. Mayhall*, 27 Mo. 377.) Nor does the term "lawfully possessed" involve an inquiry into the lawfulness



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of the possession as regards title, but only in regard to the mode of obtaining it, and is equivalent to "peaceably possessed." (Michau v. Walsh, 6 Mo. 346; Krevet v. Meyer, 24 Mo. 110, per Scott; Beeler v. Cardwell, 29 Mo. 72.) So emphatically is this regarded as a mere possessory action, that even a tenant holding over may maintain it against his landlord. (Krevet v. Meyer, *supra*.)

This complaint conforms to the third section of the statute, and avers that the plaintiff was lawfully possessed of the premises, and that the defendants wrongfully and without force, by disseizin, obtained possession, &c. Are these averments of lawful, *i. e.* peaceable possession, by the plaintiff, and of wrongful disseizin or dispossession by the defendants, sustained by proof merely that the plaintiff had a deed of the property, paid taxes upon it, and exercised acts of ownership (not acts of possession) over it, the lot being open and uninclosed, and that defendants entered upon, under claim of title, and fenced the same? It seems to me perfectly clear that, whether we look at the language of the statute merely or consult its judicial interpretation, this question must be answered in the negative. A deed, though it may be offered to show the extent of possession, actual possession of a part being proved, of itself does not prove possession, but ownership, which is not in issue; and so paying taxes and other things may be called acts of ownership, which may or may not be acts of possession. This subject has often been before our courts, and possession has always been found necessary. This possession may be personal or by agent, and it may be by actual occupancy as by living upon the premises, or by fencing and using the land or lot, or by occupying it for some business, if not fenced, or by exclusively holding the keys of an unoccupied building and controlling it. Nor is it necessary to be always on the land, provided the occupation is intended to be permanent, and the occupier has only left it temporarily. One of the strongest cases in this court, tending to show that actual possession is not necessary, is the case of Bartlett v. Draper, 23 Mo. 407. The plaintiff had peaceably taken possession of his own lots, formerly occupied by defendants, and commenced building a fence around them, but in the autumn had

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only proceeded so far as to plant the posts. In the spring, before he had completed the fence, the defendants entered against his protest, and fenced the lots. In an action against them, the court held that any "act done by himself (the plaintiff) on the premises, indicating an intention to hold possession thereof to himself, will be sufficient to give him the actual possession." This is very far from making title with payment of taxes and acts of ownership merely, evidence of peaceable possession and dis-seizin. Another case where it is claimed actual possession is not required is that of Hoffstetter v. Blattner, 8 Mo. 276. In that case, the plaintiff purchased a house in which defendant's lessor claimed an interest, and the vendor gave him possession by delivering him the keys with that intent, and afterward, until entry by defendants, no one went upon the premises except by getting the key of him and with his consent. The defendants having entered by a false key, were ousted by judgment in this form of action, the court holding that the delivery of the keys of the house, it being locked, with the intention of delivering possession, amounted to a delivery of possession. In Kincaid v. Logue, 7 Mo. 168, and in Packwood v. Thorp, 8 Mo. 636, the doctrine is recognized that actual possession of that part of the premises where the wrongful entry is made is not necessary, provided the claimant is in actual possession of a part, and owns the portion entered upon.

It is unnecessary to cite our numerous decisions directly requiring possession in the plaintiff, as it is conceded in this case as a general proposition, it only being contended that the doctrine of constructive possession was broad enough to cover ownership, accompanied by tax-paying and other acts of ownership, without showing whether these acts of ownership were also acts of possession.

The third proposition involved in the instruction under discussion, to-wit: That the possession of a portion of the premises carries the possession of the whole, is correct, if the title covers the whole. But unfortunately for the plaintiff, he was not in possession of the house himself, but Anna Goerges, who alone in this form of action could complain of the entry. It has

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always been held that the landlord has no such possession as will enable him to complain of a disseizin of his tenant, and, as his possession is not disturbed, the proposition will not avail him. The instruction complained of presented to the jury an incorrect view of the law pertaining to the right of the plaintiffs, without actual possession, to maintain this action, and for that reason the District Court should have reversed the judgment.

For not doing so, its judgment, and that of the Circuit Court is reversed and the cause remanded. The other judges concur.

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THE INTERNATIONAL MUTUAL LIVE STOCK INSURANCE COMPANY,  
Appellant, v. FREDERICK LANG *et al.*, Respondents.

1. *Practice, Civil — Supreme Court — Failure to prosecute appeal — Judgment affirmed, when.*— Where respondent presents in the Supreme Court a perfect transcript of the record, and it appears therefrom that the appeal was taken more than thirty days before the commencement of the term, and that no steps have been taken to prosecute the appeal, the judgment of the lower court will, on motion, be affirmed. (See Gen. Stat. 1865, ch. 135, §§ 29, 46, and p. 890, § 17.)

*Appeal from St. Louis Circuit Court.*

*Mitchell & Smith*, for appellant.

*Jecko & Hospes*, for respondents.

WAGNER, Judge, delivered the opinion of the court.

The respondents now come into this court and present a perfect transcript of the record, and move for an affirmance of the judgment of the court below, on the ground that the appellant has failed to prosecute its appeal. It appears from the record that the appeal was taken on the 3d day of April, 1869, and there has been an utter failure to prosecute the same.

Let the motion be sustained and the judgment affirmed. The other judges concur.

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Stewart v. Thomas, Adm'r of Ball, et al.

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E. C. STEWART, Defendant in Error, v. THOMAS, ADM'R OF  
BALL, et al., Plaintiffs in Error.

1. *Sheriff—Bond, liability on—Section 30, chapter 63, R. C. 1855.*—The obligor in a bond of indemnity given under section 30, ch. 63, R. C. 1855, is liable thereon to the sheriff as well as to persons claiming the property.
2. *Sheriff—Execution—Indemnity bond, suit on, by sheriff—Notice to plaintiff in execution.*—Where judgment is rendered against a sheriff on his bond, for an unlawful levy, and he afterward sues plaintiff in the execution on his bond of indemnity (R. C. 1855, ch. 63, § 30), the latter may make any defense which could have been made in the original suit against the sheriff. Notice, with opportunity of making the defense, should have been given the plaintiff in the execution at the time of the first suit. Otherwise, the judgment is but *prima facie* evidence of his liability on the bond.

*Error to Sixth District Court.*

D. P. Dyer, for plaintiffs in error.

Alexander & Lewis, for defendant in error.

BLISS, Judge, delivered the opinion of the court.

The plaintiff, who was sheriff of St. Charles county, levied upon certain property at the suit of defendant Thomas, as administrator of Ball's estate, against one T. P. Grantham. The property was claimed by third persons, and upon trial of their right in sheriff's court, the issue was found in their favor, and thereupon the defendants executed a bond of indemnity to the sheriff, and directed him to proceed and sell, which he did. Afterwards, Ashby, as trustee of Mrs. Mary D. Grantham, claims the property, and brings suit upon the bond, in the sheriff's name for his use. That case came to this court, and is reported in 35 Mo. 209. It was there held that no one but the actual claimant, whose right had been tried, could avail himself of the statutory remedy upon the bond in the name of the sheriff, but the court intimated that this claimant had his remedy against the sheriff himself.

Afterwards, Ashby, as trustee, commenced suit against the sheriff, he entering his appearance without process, which is the action now before us, and the sheriff failed to notify the defend-

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ants, the makers of the bond, that suit was being prosecuted and they must defend, although he had told one of them that suit was threatened. He also failed to make any defense himself, and judgment was rendered against him by default for the value of the property so sold by him, interest, etc. ; which judgment he has satisfied, and now brings this suit to recover back the money.

Upon the trial in the Circuit Court, the jury were instructed, at the instance of the plaintiff, that if he had paid and satisfied a valid judgment against him, and in favor of the claimant, on account of the levy and sale, he was entitled to recover, unless it was shown that the judgment was the result of fraud and collusion between the claimant and plaintiff.

The defendants then asked for ten somewhat voluminous instructions, covering several points unnecessary to be considered, all of which were refused by the court ; but among the positions they desired the court to assume were the following: 1st. No one can in any manner avail himself of the bond, except the persons who claimed the property before the bond was given, whose right had been tried by the sheriff's jury, and to meet whose claim it was executed. 2d. If the sheriff, the present plaintiff, had a good defense to the action against him and failed to avail himself of it, he cannot recover upon the bond, unless he notified the makers of the pendency of the action against him, and it is not sufficient that before suit was brought he told them that it was threatened. 3d. The judgment is not conclusive against the defendants, but they make a defense, upon the merits, to the proceedings against the sheriff. These points were embraced in different forms in several of the instructions refused, but the above sufficiently indicates them.

Before proceeding to the principal question, the character of this bond should be considered. The statute as it then stood (R. C. 1855, p. 743), seems to have provided for a two-fold liability: first, a general liability to the sheriff for all damages and costs which he may sustain in consequence of the seizure and sale ; and, second, a liability to those claiming the property. In the case in 35 Mo. referred to, the court decided that the latter liability did not exist in favor of any one whose claim had not been presented,

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Stewart, v. Thomas, Adm'r of Ball, et al.

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but held nothing in relation to the liability to the sheriff himself. The bond given by these defendants was conditioned according to the statute, and I can see no reason in the claim that its obligation is different from its purport. The court was correct, then, in refusing the instructions covering the first point thus made by defendants.

But in giving the instructions asked by the plaintiff, and refusing those embodying the second and third points made as above by the defendants, the court was clearly wrong. It would be contrary to the first principles of justice to hold a person conclusively bound by a judgment, who was not a party to the proceeding, and who had no opportunity to appear and defend or assist the defense, even if there was no actual fraud—much more so where there was a good defense to the action, and the judgment was taken by default. In such case where there is an obligation to indemnify the person against whom the judgment is rendered, in a suit to enforce such obligation, the defendants should be permitted to make any defense which could have been made to the original suit. Notice, with opportunity of making defense, should have been given the defendants, otherwise the judgment is but *prima facie* evidence of the defendants' liability upon their bond. (Bridgeport Insurance Co. v. Wilson, 34 N. Y. 275; Lewis v. Knox, 2 Bibb, 453; State v. Colerick, 3 Ohio, 487; State v. Jennings, 14 Ohio St. 73; State v. Compton, 3 Barn. & Ald. 407.) The defendants' general liability on this bond to indemnify the plaintiff against all damages, etc., is to be distinguished from a liability to pay a judgment in, or do something dependent upon, the result of a specific litigation.

The judgment is reversed and the cause remanded. The other judges concur.



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State of Missouri ex rel. Attorney-General, relator, v. Conrades.

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STATE OF MISSOURI *ex rel.* ATTORNEY-GENERAL, Relator, v.  
CHRISTIAN CONRADES, Respondent.

1. *Election—St. Louis County Court—Term of office of judge appointed to fill vacancy—Construction of statute.*—Under section 2 of the amendatory act concerning St. Louis county (Adj. Sess Acts 1863-4, p. 279), the term of office of a judge appointed fill a vacancy in the St. Louis County Court, continued only until the next general election, and not till the next regular election of county judge, as contemplated by the act of January 6, 1860 (Sess. Acts 1859-60, p. 524, § 12).
2. *Elections—Terms “regular” and “general,” meaning of.*—When applied to elections, the terms “regular” and “general” are used interchangeably and synonymously.

*Information in the nature of a quo warranto.*

Johnson, Attorney-General, and *Voullaire & Neal*, for relator.

*Clover & Knox*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The attorney-general has filed in this court an information in the nature of a *quo warranto*, the object and nature of which is to oust the defendant Conrades from the office of county judge of St. Louis county, which he now holds and occupies.

The information states that one Benj. Charles was, according to law, elected a judge of the St. Louis County Court, on the first Tuesday next after the first Monday in November, 1863, to serve for the term of six years, and up to the first Monday in August, 1869; that under and by virtue of what is known as the vacating ordinance, said Charles was ousted, but reappointed by the governor to fill out his unexpired term; that on the 22d day of January, 1868, he resigned the office, and on the next day thereafter, viz: the 23d day of January, Charles W. Irwin was appointed and commissioned judge of said County Court in the place and stead of said Charles, and to fill the vacancy according to law.

The information then alleges that Conrades, the defendant, claims to hold said office of judge of the County Court, and to



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be the regular and legal successor of Irwin, by virtue of an election held in St. Louis county on the first Tuesday after the first Monday in November, 1868. It is admitted that Conrades was elected at that time, and that he has been regularly commissioned, but the question is whether there was any vacancy existing, and whether any legal election for that office could be held. The difficulty in the case originates out of the fact that the time for holding most of the elections in this State has been changed from August to November.

When the St. Louis County Court was instituted, the time designated for electing the judges was the first Monday in August. According to the statute, the election at which Charles was chosen would have taken place on that day, but the Constitutional Convention, at its session in June, 1863, provided by ordinance that whatever elections of judges or clerks of courts, or other officers, was then fixed by law or by any order of court for the first Monday of August, 1863, should be held on the Tuesday next after the first Monday of November, 1863. (See Journal of Convention, 1863, Drake's amendment, p. 255.) Since that time, by constitutional provision and by statute, all elections of a general character have been fixed in November. But it is contended that, according to the organization of the St. Louis County Court, the time at which the election of its members takes place is not governed by the general law, and that the postponement authorized by the convention in 1863 applied to that year only, and that afterwards the elections should be held in August.

The court is composed of seven judges, elected at different periods. When their terms begin or end, is not an issue in this case. The only question presented by the record is, was Conrades legally elected, or has he been guilty of usurpation of office? By an act of the Legislature, approved January 16, 1860, in relation to the county judges, who were then called county commissioners, it was provided that if any member "shall vacate his office by death, resignation, or otherwise, except by expiration of his term of office, it shall be the duty of the governor of the State to appoint, for the remainder of the term for

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which such officer was elected or appointed, a suitable person to perform the duties of such office." (Acts 1859-60, p. 524, § 12.)

Section 12, as above recited, was repealed by an act, approved February 8, 1864, and the following was enacted: "If any officer in St. Louis county, mentioned in the act of which this is amendatory, \* \* \* \* shall hereafter vacate his office by death, resignation, or otherwise, except by expiration of his term of office, it shall be the duty of the governor of the State to appoint, until the next regular election, a suitable person to perform the duties of the office." (Adj. Sess. Acts 1863, p. 279.)

By the act of 1859, the governor was invested with full power to appoint, whenever a vacancy occurred, for the remainder of the term. The act of 1864 was a limitation on this power of appointment, and abridged its exercise to the next regular election. It is insisted now that in passing this law the Legislature meant that the executive appointee should continue to hold his office till the next regular election of county judges, and that the act had exclusive reference to that election. But this construction, we think, is founded in misconception, and is not maintainable.

It was the obvious intention to give the people an opportunity to elect this officer at the earliest practicable moment, without incurring the expense of a special election. When applied to elections, the terms "regular" and "general" have been used interchangeably and synonymously. The word "regular" is used in reference to the general election occurring throughout the State. It was employed by the draftsmen of this bill in contradistinction to the election which was held in St. Louis county specially for judges of the County Court.

Irwin, then, could only hold by virtue of the governor's appointment up to the time when a regular or general election was held. At that time it was competent for the people to elect his successor. Conrades, then, received a majority of the votes, was duly commissioned and qualified. It follows, therefore, that he was legally elected, and has been guilty of no usurpation of office.

The writ will be denied. The other judges concur.

HENRY MARTIN, Respondent, v. JOHN KNAPP *et al.*, Appellants.

1. *Limitations — Administrator's bond — Construction of statute.* — An action on an administrator's bond has ten years to run from the date of the accruing of the action. (R. C. 1855, ch. 103, Art. II, § 2.) Section 9, ch. 191, Gen. Stat. 1865, amending section 3, Art. II, of the practice act of 1849 (Sess. Acts 1849, p. 74), was intended to enlarge the range of the ten years' limitation, as applied to personal actions, so as to include actions upon written instruments, where the payments contemplated by the obligation were to arise indirectly and collaterally as well as directly. Section 48, Art. I, ch. 2, R. C. 1855 (Gen. Stat. 1865, ch. 120, § 49), limiting actions against the sureties of administrators to seven years, is restrictive in its character, and was framed upon the evident hypothesis that the general limitation act provided a longer time in which such suits could be brought.

*Appeal from St. Louis Circuit Court.*

*Sharp & Broadhead, and Lackland, Martin & Lackland,*  
for appellants.

The bond sued on, taken in connection with its conditions, is not a writing for the payment of money; and the period of limitation is five years, and not ten. (Gen. Stat. 1865, ch. 191, §§ 9, 10; *Little v. Mercer*, 9 Mo. 221; *Crigler v. Quarles*, 10 Mo. 324.)

*Krum, Decker & Krum*, for respondent.

The action against the securities on the bond is not limited to five years. In the revision of 1855, the words "direct," before "payment," and "debt," after the word "action," as they appear in the revision of 1845, are intentionally omitted. This ten-year limitation of 1855 is broad enough to embrace all actions upon any writing for the payment of money, whether certain or uncertain, liquidated or unliquidated, upon express or implied contract. (*Reyburn v. Casey*, 29 Mo. 129; same case, affirmed, 31 Mo. 252; *Moorman v. Sharp*, 35 Mo. 283; 39 Mo. 22; R. C. 1855, p. 131, § 48.)

CURRIER, Judge, delivered the opinion of the court.

The Probate Court of St. Louis county appointed John W. Wills administrator upon the estate of John Martin, deceased.

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Wills accepted the appointment, and duly filed his administration bond in the penal sum of \$12,000, with the defendants as his sureties. The bond bears date August 29, 1856, the condition thereto providing that "if John W. Wills, administrator of the estate of John Martin, deceased, shall faithfully administer said estate, account for, pay, and deliver all money and property of said estate, and perform all other things touching said administration, required by law, or the order or decree of any court having jurisdiction, then the above bond to be void, otherwise to remain in full force."

March 16, 1860, Wills made a final settlement of his administration account, the sum of \$7,076.44 being found in his hands subject to distribution, and distribution thereof was ordered accordingly, the sum of \$3,538.22 being directed by the decree to be paid to the plaintiff.

February 28, 1868, an execution reciting the decree of March 16, 1860, was issued by the Probate Court against Wills for the amount thereby ordered to be paid to the plaintiff, it appearing that the same had been demanded, and payment thereof refused. The execution was returned *nulla bona*.

March 7, 1869, a *scire facias* was sued out against the defendants, as Wills' securities, and judgment thereupon rendered against them in the Probate Court. An appeal was taken to the Circuit Court, and from that court to this.

The only defense relied upon here is the statute of limitations. The defendants take the ground that the statute commenced running from March 16, 1860, the date of the decree of distribution, and that the case is governed by section 10, chapter 191, of the General Statutes, which provides a limitation of five years. On the other hand, the plaintiff claims that the case is governed by the first clause of section 9 of that chapter, which provides a limitation of ten years. Whether the action falls within the one or the other of these sections is the question to be decided. These sections are the same as sections 2 and 3, article II, of the limitation act in the revision of 1855.

The first clause of section 9 above referred to, fixing a limitation of ten years, is in these words: "An action upon any

writing, whether sealed or unsealed, for the payment of money or property." The defendants' proposition is that the bond executed by them is not a writing "for the payment of money or property" within the intent and meaning of this provision, and that it consequently falls within the class of obligations which are barred in five years, under the provisions of the next succeeding section. I am not aware that it has ever before been claimed that an action based upon the obligations of an administrator's bond was barred in five years from the date of the accruing of the action. The argument by which that proposition is now sought to be sustained rests upon an artificial construction of the language of different provisions of the limitation enactment. I can not think that the construction so ingenuously contended for gives the true interpretation and development of the intentions of the Legislature. It was provided by the act of 1845 (R. S. 1845, p. 716, § 1), that all actions founded on any writing, whether sealed or unsealed, for the direct payment of money or property, should be barred in ten years, and that (§ 2) "all actions of debt founded upon any contract or liability" not otherwise limited, should be barred in five years. The act contained no provision limiting the time of suing upon the covenants of a deed. In 1849, the Legislature remodeled the limitation act and extended its provisions (Sess. Acts 1849, p. 74). Personal actions limited to ten years were divided into three classes, namely (Art. II, § 3): 1st, all actions upon any writing, etc., for the "direct" payment of money or property, as in section 1 of that of 1845; 2d, actions upon covenants of warranty and seizin in a deed conveying real estate; 3d, actions for relief not otherwise provided for; the language in which the second and third classes were described being the same as the second and third subdivisions of section 9 of the present law. Actions limited to five years were described in the same language employed in section 10 of the existing statute, so far as that language has any bearing upon the present inquiry.

In the revision of 1855, the act of 1849 was substantially re-enacted, with two or three modifications. One of these changes consisted in omitting the word "direct," in describing actions

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founded upon written instruments for the payment of money or property, so as to include in the ten-years' limitation all actions founded on such instruments, whether the payment were "direct" or indirect. The residue of the section was continued as in the act of 1849, being the same as section 9, chapter 191, of the General Statutes now in force. It is manifest, therefore, that the Legislature, by the change introduced in 1855, intended to enlarge the range of the ten-years' limitation, as applied to personal actions, so as to include a class of actions not embraced in the enactment of 1849—that is, actions upon written instruments, where the payments contemplated by the obligation were to arise indirectly and collaterally as well as directly. Unless the law as amended is construed to have this effect, then the amendment was nugatory, and the purposes of the Legislature are unaccomplished.

This view of the case is not met by the argument drawn from the provisions of the statute respecting suits founded upon the covenants in a deed conveying real estate; for these provisions, as they now stand, were in the law prior to the introduction of the amendment. The amendment was not restrictive, but was clearly intended to enlarge the scope of the first clause of the section under consideration. Unless the section as amended is construed so as to embrace suits where the payments result collaterally, and consequently, in other words, indirectly, to what class of actions is the amendment to be applied?

That there was no intention on the part of the Legislature to limit action on the bonds of administrators to five years, is evident from other provisions of the statute. It is provided in the administration enactment (R. C. 1855, p. 121, § 48) that all suits prosecuted by an administrator *de bonis non* against the securities of his predecessor, upon their administration bond, "shall be commenced within seven years after the revocation or the surrender of the letters, or the death of the principal" in such bond. The same provision is continued in the General Statutes (Gen. Stat. 1865, ch. 120, § 49). This is a limitation enactment, and it is quite inconsistent with the theory sought to be maintained by the appellants. It is restrictive in its character, and was framed upon the evident hypothesis that the general



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limitation act provided a longer time in which such suits could be brought. No reason suggests itself why a distributee should be confined to narrower limits as to the time in which to sue than an administrator *de bonis non*. The reasons are the other way.

The result is, we can not accept the construction of the statute advocated by the appellants' counsel, and the judgment is accordingly affirmed. Judge Bliss concurs; Judge Wagner absent.

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IN THE MATTER OF THE SALINE COUNTY SUBSCRIPTION, PHILIP  
H. THOMPSON *et al.*, Petitioners.

1. *Certiorari will not lie, except to review judicial proceedings.*—The action of a County Court in subscribing to railroad stock and issuing bonds for payment thereof is a discretionary and not a judicial proceeding, and therefore not the subject of review by writ of *certiorari* from the Supreme Court.

*Petition of certiorari.*

*W. B. Napton*, for petitioners.

This court may review the subscription of the County Court, on *certiorari*. The writ is addressed to a court, proceeding under a special law, and judicially construing that law erroneously, and there is no remedy by appeal on error. (*Hannibal and St. Joseph R.R. Co. v. Morton*, 27 Mo. 317; *Redfield on Railroads*, ch. 27, § 202, and cases there cited; *Robinson v. Board of Supervisors*, 16 Cal. 208, and authorities cited in that case; *Gillespie v. Broas*, 23 Barb. 370.) The act of the County Court was not legislative nor executive, nor was it the exercise of a mere discretion not subject to the review of any other tribunal.

*J. B. Henderson*, and *Sharp & Broadhead*, for respondent.

A *certiorari*, at common law, lies only to inferior courts, and officers exercising judicial powers. (*People ex rel. Agnew et al. v. Mayor, etc.*, 2 Hill. 9.) The writ will not lie to review official proceedings of either a legislative, executive, or ministerial



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character. (Same case, pp. 11, 12, 13; 43 Barb. 232; People v. Supervisors Queens County, 1 Hill, 195; People *ex rel.* Church v. Supervisors, 15 Wend. 198.) Mere corporate or ministerial acts can not be reviewed on *certiorari*. The acts must be plainly judicial. (Mount Morris Square v. New York, 2 Hill, 14.)

BLISS, Judge, delivered the opinion of the court.

The County Court of Saline county subscribed for \$400,000 of the stock of the Louisiana and Missouri River Railroad Company, and have issued bonds in payment of said stock. Philip H. Thompson and other tax-payers of said county sued out of this court a writ of *certiorari* directed to the judges of said court, charging a want of authority to make the subscription and issue the bonds.

Before considering any other question, the preliminary one must be decided, whether *certiorari* will lie in a case of this kind. "A *certiorari* is an original writ issued out of chancery or the King's Bench, directed in the King's name, to the judges or officers of inferior courts, commanding them to return the records of a cause depending before them, to the end that the party may have the more sure and speedy justice." (Bac. Abr., *Certiorari*, A.) The matter not being regulated by statute in Missouri, either as to the cases in which this writ may issue or the practice under it, we are left entirely to the general law. The writ issues only to inferior courts and to review only judicial action. Was, then, the action of the County Court of Saline county, in subscribing to the stock of this railroad company and issuing bonds, a judicial action? Judicial action is an adjudication upon the rights of parties who in general appear or are brought before the tribunal by notice or process, and upon whose claims some decision or judgment is rendered. It implies impartiality, disinterestedness, a weighing of adverse claims, and is inconsistent with discretion on the one hand—for the tribunal must decide according to law and the rights of the parties—or with dictation on the other, for in the first instance it must exercise its own judgment under the law, and not act under a mandate

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In the matter of the Saline Co. subscription, Thompson et al., petitioners.

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from another power. The tribunal is not always surrounded with the machinery of a court, nor will such machinery necessarily make its action judicial. A County Court is certainly a judicial body for some purposes, but no more so for the name, nor for the fact that it has a seal and a clerk and keeps a record. The character of its action in a given case must decide whether that action is judicial, ministerial, or legislative, or whether it be simply that of a public agent of the county or State, as in its varied jurisdiction it may by turns be each.

The authorities all agree that the action to be reviewed by the writ must be judicial, but they are not wholly consistent as to what action is judicial. I find, however, a great preponderance, both in the reasoning of the judges, and, as I think, in the weight of the authority, against the proposition that proceedings like those of the County Court under consideration can be treated as judicial. There are but two cases in our reports where the writ of *certiorari* as an original writ was issued from this court. The first is *Rector v. Price*, 1 Mo. 198, where the principal question was the right to issue it under our then constitution; and the other is *The Hannibal and St. Joseph Railroad Company v. Morton*, 27 Mo. 317, to review the action of reviewers appointed by the Circuit Court in assessing damages to the owners of land over which this railroad passed. The question that arises in the present case was not raised in either of those, as there was no doubt in regard to the judicial character of the action under review; but our decisions upon the various subjects of County Court jurisdiction, in relation to their character as judicial or otherwise, have been generally consistent.

The proceedings in general of County Courts in probate matters have been treated as judicial, especially when they are adverse, and parties are brought in, or are supposed to be in court; and while some things in the laying out and opening of public roads may be considered as legislative or administrative, still all action affecting the property-rights of private persons is clearly judicial and subject to review in the appellate courts. (*Overbeck v. Galloway*, 10 Mo. 364; *Cooper County v. Geyer*, 19 Mo. 247; *Bernard v. Callaway County Court*, 28 Mo. 37; *County of St.*

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Louis v. Lind, 42 Mo. 348; Foster v. Dunklin, 44 Mo. 216.) This court, in *The County of St. Louis v. Sparks*, 11 Mo 201, seems to treat the action of the County Court against a defaulting collector as judicial, it having been based upon the provisions of article II of the act concerning county treasurers in the revision of 1835 (p. 151)—a very different statute from the one now in force on the subject, and one that made it the duty of the County Court to render judgment against the defaulter.

In approving the bond of a sheriff, County Courts act in a ministerial, and not in a judicial, capacity. (*State ex rel. Adamson v. Lafayette County Court*, 41 Mo. 221; *State ex rel. Jackson v. Howard County Court*, *id.* 247.)

County Courts have exclusive jurisdiction in the repairing of public buildings. "These matters belong to the administrative and ministerial functions of the County Court, and not to the judicial branch of their jurisdiction." (*Vitt v. Owens*, 42 Mo. 512.)

The action of the County Court in making a subscription to the stock of a railroad company is administrative and discretionary. There is no imperative obligation to make it. (*St. Joe and Denver City R.R. Co. v. Buchanan County*, 39 Mo. 485.)

We have held, at this term, in *Marion County v. Phillips*, that a settlement with the county collector was not a judicial act, but that of the public agents of the county with one of its officers; and the general question is also considered. The case of *St. Joe and Denver City Railroad Company v. Buchanan County* expressly decides the case at bar; and all the cases are inconsistent with the idea that the exercise of a discretionary power, given by law to the County Court of Saline county, if it be given to make a subscription to the stock of a railroad, can be in any sense a judicial proceeding. A court has no discretion, but must render judgment according to the facts and the law, while this subscription might have been made or refused. The judges were bound, it is true, to act with good judgment, judiciously; but exercising a sound judgment is by no means synonymous with rendering judgment, and acting judiciously is not always acting judicially.

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Counsel press upon our consideration the authority of *Robinson v. Board of Supervisors of Sacramento*, 16 Cal. 208, where the action of the board, in raising the salaries of certain clerks, was held by a majority of the court to be judicial, and subject to be reviewed on *certiorari*—Justices Baldwin and Cope constituting the majority, and Chief Justice Field dissenting. Justice Baldwin gives a long opinion, while C. J. Field simply says that he regards the ordinance as a mere legislative act involving in its passage no judicial functions. I have examined the authorities cited in support of the opinion of the majority, and upon which it was expressly based, contrary, as they said, to the original opinion of the judges, and am more than ever impressed with the jumble and uncertainty in which this subject has been involved in our most respectable courts. Among the authorities relied on was *Supervisors of Onondaga v. Briggs*, 2 Denio, 26, in which the plaintiff had prosecuted the defendant to recover back fees illegally charged and paid him as county attorney. His bills had been annually taxed by a Supreme Court commissioner, upon notice to the chairman of the board of supervisors, and regularly audited and paid by the board. The Supreme Court held that no part of the sums so paid him could be recovered back, and gave the following conclusions of law as applicable to the case: "1. That the taxation was a judicial determination of the matter by officers duly authorized to adjudicate upon it, and, consequently, that the taxation can not be set aside or disregarded in this collateral action. 2. But if the taxation is not conclusive, then the matter has been adjudicated by the board of supervisors, who had ample authority to decide it; and their determination is conclusive upon both parties, and especially upon themselves; and, 3. The plaintiffs have voluntarily paid the money with a full knowledge of all the facts, and can not, therefore, recover it back."

The Supreme Court of California must have relied upon the second proposition and construed it as holding that the board of supervisors, in auditing claims against the county, acts judicially, and that their action has the force of a judgment. If that was intended, it certainly is not the law of Missouri. Our County

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Courts are the auditing boards of the several counties, and the statute goes so far as to provide for an appeal to the Circuit Court if the account is rejected. (Gen. Stat. 1865, ch. 38, § 36.) Yet our courts do not hesitate to entertain suits against counties upon rejected claims, which would be absurd if their action had the force of a judgment. So, also, this court issues a *mandamus* against county courts in a proper case, commanding them to pay rejected accounts, which is utterly inconsistent with their judicial character. (State v. Buchanan County Court, 41 Mo. 254.)

The following extract from an opinion of Judge Cowen in one of the cases cited in support of Robinson v. Board, etc., is very pertinent to the general question: "The power to interfere by *certiorari* is laid down very broadly by some *dicta* importing that all infringement of rights by persons legally clothed with authority to act, but who exercise that authority illegally, may be corrected by *certiorari*. \* \* \* \* None of these cases, however, in which this language is used, and none which were referred to by the learned judges using it, have gone beyond a review of judicial decisions. Taking these *dicta* in the abstract, we might remove every by-law or other corporate act of every corporation in the State. Parks v. Mayor, etc., of Boston, held that when the mayor and alderman had a right to take property for laying out or widening a street, whenever in their opinion it was necessary, the taking was an exercise of judicial power. (8 Pick. 225.) But no other case, I think, has gone so far; and a liberal application of that decision would seem to take in every act which a corporation can do under any statute power whatever. It was said the corporation was required to adjudicate on the necessity of taking property; but the same thing may be said of every act which a corporation may do under the most common power, even affixing their corporate seal." And this most learned of judges goes on to account for their erroneous opinion, from the fact that our courts have been misled by English decisions in regard to commissioners of sewers, who constitute a court of record, and whose acts are judicial. (In the matter of Mt. Morris Square, 2 Hill, 22.) Since the hearing

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in Robinson v. Board, etc., of Sacramento, the Supreme Court of New York, in The People v. Supervisors of Livingston County (43 Barb. 232), follows up the matter of Mt. Morris Square, in restricting the operation of the writ, and condemning the looseness of the earlier decisions. (See also The People v. Board of Health, etc., 33 Barb. 346.)

If we were to entertain jurisdiction to review by *certiorari* the action of the County Court of Saline upon a discretionary matter, and one involving no judicial functions, I know not what proceeding of county and city authorities might not be brought before us. Counsel are aware of the labor involved to keep down our growing docket, and can readily imagine its condition if we were to assume the power of revising the ministerial and legislative acts of all public agents in the State. Still, had we the jurisdiction, the matter of convenience to the people and bondholders of Saline, suggested by counsel, would be a proper matter of consideration, as this is a discretionary writ, and not a writ of right; but as it is, ultimate confusion, rather than convenience, would follow such a breaking down of the landmarks of the law.

The motion for the writ was granted without hearing, but the proceedings sought to be reviewed not being judicial, the writ is quashed. The other judges concur.

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STATE OF MISSOURI *ex rel.* SAMUEL C. McCUNE, Relator, *v.*  
THE RALLS COUNTY COURT, Respondent.

1. *Quo warranto*—County sheriff—Vacancy—Title to office.—A vacancy in the office of sheriff such as a County Court is authorized to fill implies a state of things where no one has any title to the office. Such vacancy does not exist, when, on *quo warranto*, judgment of ouster against the incumbent of the office was obtained on the ground that relator had a superior title.

*Petition for mandamus.*

Geo. H. Shields, and H. B. Johnson, for relator.

Sharp & Broadhead, for respondent.

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BLISS, Judge, delivered the opinion of the court.

At the March term of this court a judgment of ouster was rendered against John H. Steers, then usurping the office of sheriff of Ralls county. The facts upon which the judgment was based were that said Steers and the present relator, Samuel McCune, were the only candidates before the people at the general election of 1868, for the office of sheriff of Ralls county; that the said McCune received a majority of the votes cast for that office, but that the county clerk improperly refused to count the votes of one of the precincts of the county, which refusal changed the result and gave a majority to Steers, to whom he issued his certificate, and who obtained his commission. The court held that the clerk had no right thus to reject the votes of a precinct, and that Steers was not elected to and entitled to the office. Upon the rendition of this judgment, the present relator exhibited to the governor such evidence of his election that he gave him a commission as sheriff of said Ralls county, and he took the oath and presented his bond as sheriff to the Circuit Court, which was approved. In the meantime the County Court, upon notice of the judgment of ouster against Steers, declared a vacancy, appointed Steers to fill it, and ordered a new election under the statute. The judges refused to recognize the relator as sheriff or fix his bond, but he filed and presented one as county collector, admitted to be sufficient to cover the State and county revenue, and tendered it to the County Court, with proof of the requisite responsibility of the signers; but the court made an order rejecting it, without giving any reasons.

This court, at the relation of said McCune, issued an alternative writ of *mandamus*, directed to the said County Court of Ralls, to "accept and approve the said bond and recognize the relator as the lawful sheriff of the county," or show cause, etc. To this writ the respondents make return that by virtue of the judgment upon said writ of *quo warranto*, the office of sheriff and collector of Ralls county became vacant; that, under the constitution, it became their duty to fill said vacancy by appointment until it could be filled by election; that they filled the



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vacancy by the appointment of said Steers, and ordered a special election; and, having made such appointment and order, they could not approve the relator's bond.

The return assumes that the judgment of ouster created a vacancy, when in fact it had nothing whatever to do with the question. Whether there was a vacancy or not did not depend upon the question of intrusion, but upon the further question not directly passed upon by the court, whether there was any one else entitled to hold the office. It is a singular assumption that, because Steers is not entitled to the office, therefore no one is. His want of right may have arisen from the fact that some one else possessed the right, or it may have arisen from some other cause. It is true, a simple judgment of ouster is not a judgment in favor of any other claimant; but the return of the county judges seems to assume that it has the effect of a judgment against such claimant, as well as against the intruder.

Counsel inquire if death, resignation, or removal could more effectually make a vacancy than was created in that case. That depends entirely upon the meaning of the term. We are often deceived by a play upon words. If we are to understand by vacancy an interregnum, without reference to the right of any one to fill the place or the space, before the person entitled to it has qualified, then the action of the court created one; but such a vacancy as the County Court is authorized to fill implies a state of things where no one has any title to the office—a fact not involved in the judgment. So far from that being the case, the judgment itself was founded upon the fact that the present relator had the superior right, although, as he was not named in the proceedings, no judgment could have been rendered in his favor. Had the proceeding been instituted on his relation, the judgment would have been for him as well as against the respondent; but being upon the relation of the attorney-general, it could only be one of ouster.

The returned facts show that, after the judgment of ouster which advised the governor of the fact found by the court, that McCune had received a majority of the votes, and of the error in the certificate of the clerk upon which he had issued his com-

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The State of Missouri *ex rel.* Rice, relator, v. The Co. Court of Ralls Co.

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mission to Steers, he at once gave a commission to McCune, who had been entitled to it from the beginning. How, then, was there a vacancy, in the legal sense of the term, when the relator proceeded at once to obtain his commission, as soon as one could be issued under the judgment, canceling in effect that of the intruder, and to qualify under it?

This case is precisely, in all material facts, like that of *State ex rel. Jackson v. Howard County Court*, 41 Mo. 246, and the Ralls County Court should have been governed by that case. The fact that Steers had obtained a commission does not vary it, for a commission vacated by judgment is certainly no better than none at all. The matters relating to the effect of the governor's commission and other questions are so well reasoned in that case that to go into them now would be mere repetition.

Inasmuch as it is admitted by the agreed statement of facts that the bond tendered by the relator was sufficient, and that he is commissioned and has otherwise qualified, a peremptory *mandamus* will issue. Judge Currier concurs; Judge Wagner is absent.

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THE STATE OF MISSOURI *ex rel.* THOMAS C. RICE, Relator, v.  
THE COUNTY COURT OF RALLS COUNTY, Respondent.

1. State *ex rel.* McCune v. The County Court of Ralls County, *ante*, p. 58, affirmed.

*Petition for mandamus.*

Geo. H. Shields, and H. B. Johnson, for relator.

Sharp & Broadhead, for respondent.

BLISS, Judge, delivered the opinion of the court.

Judgment of ouster was rendered at the March term of this court against W. D. Bishop, who had intruded into the office of assessor of Ralls county. The relator has since obtained a commission, and asks for a *mandamus* upon the County Court to

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approve his bond and recognize him as the lawful assessor. This case stands precisely upon the same footing as that of *The State ex rel. McCune v. the same defendants*, decided at this term, the facts being the same throughout. A peremptory *mandamus* will issue. Judge Currier concurs ; Judge Wagner absent.

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WILLIAM EINSTEIN, Appellant, *v.* EDWARD J. GAY *et al.*,  
Respondents.

1. *Land and land titles—Tax collector's deed—Title of State of Missouri—Of former purchaser—What title conveyed.*—A tax collector's deed which purports to convey to the purchaser "all the right, title, and estate" of the State of Missouri in and to the premises, and does not purport to convey anything more, can pass no title to the purchaser.

*Appeal from St. Louis Circuit Court.*

*Hill & Jewett*, for appellant.

*Glover & Shepley*, for respondents.

CURRIER, Judge, delivered the opinion of the court.

This is an action of ejectment. The plaintiff claims under a tax collector's deed. The court below held the title bad, and rendered judgment accordingly. The plaintiff brings the case here by appeal.

In disposing of this cause, we do not feel called upon to indulge in any general discussion of the subject of tax titles, or to go into an examination of the points raised upon the various acts and proceedings antecedent to the execution and delivery of the deed upon which the plaintiff relies as evidence of his title. The defectiveness of this deed relieves us of that duty. It purports to convey to the plaintiff "all the right, title, and estate" of the State of Missouri, of, in, and to "the premises in question;" and it purports to convey nothing other, different, or more. But the State had no title—nothing but a tax lien. This is admitted, and the case shows the fact to be so. Therefore, no

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title passed by the deed. This is the necessary conclusion, unless construction is employed to give the deed an effect beyond the broadest scope of its terms, thereby making it effectual to convey the title of Bennett, the tax debtor, when it purports to convey merely the title of the State. We are referred to no precedent countenancing such a proceeding in this class of cases, and we are not inclined to make one.

The authority of the decision in the *Bank of Utica v. Mercereau*, 3 Barb. Ch. 577, does not meet the exigency of the present case. The objection to the deed there was that it was not executed in the name of the people of the State, according to the direction of the statute, which had long been in force. The objection was overruled on the ground that, although the deed was informal, it nevertheless had the sanction of long usage and great names—that custom had interpreted the statute, and that “thousands of titles” were dependent on conveyances executed in the same form. The intimation of the court is that but for these considerations the deed was subject to the objection taken. There are no such considerations to urge here; besides, there is no parallel between the two cases. The question here is, not as to the sufficiency of the deed in its formal parts, but whether it shall be construed as operative to convey a title which, by its terms of description and designation, it does not purport to convey.

But it is urged that, in virtue of the provision of the statute (Adj. Sess. Act, 1863-4, p. 89, § 21), the deed conveyed the “title to the land therein described” without reference to the question of previous ownership, or the regularity of the antecedent proceedings, and independent of the title therein expressed to be conveyed. The statute has no such sweeping operation. It has already been held, in *Abbott v. Lindenbower*, 42 Mo. 162, that the collector’s deed conveyed nothing whatever unless the property it assumed to convey had previously been legally assessed, etc.; that the deed did not necessarily pass the title. The prior conditions being complied with, the statute (section 21, p. 89) declares what shall be the effect of an appropriate deed. No form being prescribed, the form must be adjusted to the facts

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of the case. The deed must be so drawn and shaped as to constitute an instrument which, by the "rules of the common law, would be sufficient to transfer the title of the former owner and vest the estate in the purchaser." (Blackw. Tax Titles, 435; and cases cited.) The statute is not pertinent to the present inquiry. We are not inquiring into the effect of an appropriate deed. The question here is this: is this deed, as a common-law conveyance, by force of the terms employed, sufficient to transfer the title of the "former owner" and vest it in the plaintiff? It does not purport to do that, and, as already intimated, we are not prepared to hold that a tax deed is good for more than is apparent upon its face, thereby making it operative to convey one title, when, upon its face and by its terms, it assumes to convey another and a different title.

The judgment must therefore be affirmed. The other judges concur.

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THE STATE OF MISSOURI, Respondent, v. THADDEUS COOPER,  
Appellant.

1. *Practice, criminal*—*Oral instructions, parties can not consent to.*—The statute (Gen. Stat. 1865, ch. 213, § 80), does not authorize the judge of a Criminal Court, even at the request or by consent of parties, to give oral instructions as to matters of law. It would be incompetent for the prisoner himself to consent to such waiver of the statutory requirement, and, *a fortiori*, his counsel can have no such right.

*Appeal from St. Louis Criminal Court.*

*Patrick & Drummond*, and *Cline, Jamison & Day*, for appellant.

*C. P. Johnson*, circuit attorney, for respondent.

WAGNER, Judge, delivered the opinion of the court.

Defendant was indicted and convicted in the Criminal Court for robbery. The bill of exceptions states that after the close of the evidence "the court, at the request of the defendant's coun-

sel, and in his presence and the circuit attorney, gave oral instructions to the jury upon the law of the case."

This is assigned for error, and is the only question worthy of attention in this court. What the instructions were is not inserted, and the probabilities are that it would be impossible to arrive at anything like accuracy were the attempt made.

The statutory provision in regard to criminal trials is that "the court shall not, on the trial of the issue on any indictment, sum up or comment upon the evidence, or charge the jury as to matter of fact, unless requested so to do by the prosecuting attorney and the defendant or his counsel; but the court may instruct the jury on any point of law arising in the cause, which instructions shall be in writing." (Gen. Stat. 1865, ch. 213, § 30.)

This section was obviously intended to change the common-law practice in regard to summing up and commenting on evidence, and prohibit the court from doing so except at the request of the parties. But when it comes to giving instructions upon any point of law arising in the case, the instructions are expressly required to be in writing. Every person knows how difficult it is to obtain an exact account of words, in writing, spoken in the midst of a trial. The whole case may turn upon the jury misunderstanding a single word used by the judge. When it is necessary to make out a bill of exceptions, it will often be found difficult—indeed, quite impossible—for the judge himself to remember, with anything like precision, the language used in declaring the law. The accused may thus be prejudiced with the jury, and be denied the right of rectifying the mistake in the appellate court. The law was enacted to guard, as far as possible, against misapprehension by the jury of the law of the case, as promulgated and laid down by the court, and, if error was committed, to secure a full and fair bill of exceptions.

There is no authorization, at the request or by the consent of the parties, to give oral instructions as to matters of law, but the language is, they shall be in writing. In other States, similar statutory provisions are to be found, and in all instances the



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courts, in giving them a practical construction, have held that giving written instructions is mandatory and imperative.

In this case there was no consent in a matter which the statute allows. It was not a consent to the summing up or commenting upon the evidence, which is permissible, but a consent to giving oral instructions, which is prohibited. The prisoner did not consent, but his counsel did. I deny that the counsel has any authority to consent to an infringement on the rights and privileges of his client in such a case. I hold that it would not have been competent for the prisoner himself to have done so. The provisions of the law are express and positive. They were enacted for wise and beneficial purposes, and neither courts nor parties are to be allowed to treat the law as naught, and construe it into a dead letter, and substitute a different arrangement in its stead. Establish the practice pursued in the court below, and it will happen that at the end of a wearisome trial, when the court and bar are anxious to terminate their labors, propositions will be made by the respective counsel to forego the work of drafting written instructions, and let the court deliver an oral charge. If the proposition comes from the prosecuting officer, the defendant dare not withhold his consent without creating prejudice before an impatient and exhausted jury—the very thing which, of all others, he is most anxious to avoid. The jury are liable to misapprehend the language of the court, a full, perfect, and satisfactory bill of exceptions is unattainable; and thus a man's rights are invaded and frittered away, through a violation of law which was made for his protection. Public policy and the uniform and explicit standard which should always prevail in the administration of criminal justice, demand that the statute should be literally construed and rigidly adhered to and enforced.

The judgment will be reversed and the cause remanded. The other judges concur.



ROBERT MITCHELL *et al.*, Respondents, *v.* THE STEAMBOAT  
MAGNOLIA, Appellant.

1. *District Courts, jurisdiction of—Admiralty—Maritime liens.*—Maritime contracts, in the sense used in admiralty practice, and marine torts, in cases where a maritime lien arises, belong to the exclusive and original jurisdiction of the District Courts of the United States; and therefore those provisions in the statutes of this State which authorize actions *in rem* against vessels by name in such cases, are not sustainable.
2. *Admiralty—Steamboats, equipment of, at home port—Jurisdiction of State courts.*—The furnishing of the material for the equipment and outfit of a steamboat, at her home port, is not a regulation of commerce, nor a maritime contract, but such a contract as it is competent for the States to act upon, and to create such liens in relation to, as their Legislatures may deem just and expedient.

*Appeal from St. Louis Circuit Court.*

*Sharp & Broadhead*, for appellant.

*Rankin & Hayden*, for respondents.

The cause of action sued on, under the constitution and laws of the United States, is not within the jurisdiction of the Federal courts, but belongs purely to the State courts. (*People's Ferry Co. v. Beers*, 20 How. 393; *Morewood v. Enequist*, 23 How. 491; *Roach v. Chapman*, 24 How. 129; *The Belfast*, 7 Wall. 624, 646.)

WAGNER, Judge, delivered the opinion of the court.

The whole controversy in this case depends upon the jurisdiction of the State courts. The action was for materials furnished in fitting out and equipping the steamboat *Magnolia*, a vessel used in navigating the waters of this State, and duly enrolled at the port of St. Louis. It was a proceeding, pursuant to the statute, directly against the boat by name.

It is supposed that by the constitution and laws of the United States, and under recent decisions of the national tribunal, State courts are shorn of all power in proceedings of this nature, and on that theory the defense is based. State statutes authorizing proceeding *in rem* against vessels, for causes cognizable in

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admiralty, are statutes conferring admiralty jurisdiction, and it is conceded that they are therefore unconstitutional.

Maritime contracts, in the sense used in admiralty practice, and marine torts, in cases where a maritime lien arises, belong to the exclusive and original jurisdiction of the District Courts of the United States, and, therefore, those provisions in the statutes of this State which authorize actions *in rem* against vessels by name, in such cases, are not sustainable.

The question, then, arises, is the subject-matter on which this suit is founded a maritime contract, which could only be prosecuted directly against the boat in the admiralty courts of this Union? The articles were furnished and used in equipping the vessel and getting her ready to be put in service, and were a part of the necessary material for her construction. By necessary and fair import they should be classed within the designation of building material.

It is said by a learned writer that the admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services purely maritime and touching rights and duties appertaining to commercial navigation. (1 Conckl. M. L. 19.) Accordingly, it has been held by the Supreme Court of the United States that the admiralty jurisdiction does not extend to cases where a lien is claimed by the builders of a vessel for work done and materials found in its construction. (People's Ferry Co. v. Beers *et al.*, 20 How. 393.) In the last case in which this vexed question was brought in review, the Supreme Court of the United States used the following language: "Authority does not exist in the State courts to hear and determine a suit *in rem* in admiralty to enforce a maritime lien. Such a lien does not arise in a contract for materials and supplies furnished to a vessel in her home port; and, in respect to such contracts, it is competent for the States, under the decisions of this court, to create such liens as their Legislatures may deem just and expedient, not amounting to a regulation of commerce, and to enact reasonable rules and regulations prescribing the mode of their enforcement. Contracts for shipbuilding are held not to be maritime contracts,

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and, of course, they fall within the same category; but in all cases where a maritime lien arises, the original jurisdiction to enforce the same by a proceeding *in rem* is exclusive in the District Courts of the United States, as provided in the ninth section of the judiciary act." (The Belfast, 7 Wall. 624.)

Such is the ultimate conclusion of the Supreme Court of the United States, after a most exhaustive consideration of the whole subject. The furnishing of the materials for the equipment and outfit of the boat, in this case, was not a regulation of commerce nor a maritime contract, but it was such a contract as the court holds it is competent for the States to act upon, and to create such liens as their Legislatures may deem just and expedient. I am accordingly of the opinion that the court below had jurisdiction, and advise that the judgment be affirmed.

Affirmed; the other judges concurring.

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GEORGE PEISH *et al.*, Respondents, *v.* STEAMBOAT MAGNOLIA,  
Appellant.

1. *Mitchell v. Steamboat Magnolia*, *ante*, p. 67, affirmed.

*Appeal from St. Louis Circuit Court.*

*Sharp & Broadhead*, for appellant.

*Rankin & Hayden*, for respondents.

WAGNER, Judge, delivered the opinion of the court.

The facts in this case are similar in all respects with those in the case of *Mitchell v. Steamboat Magnolia*, *ante*, p. 67. For the reasons given in that case, the judgment here will be affirmed. The other judges concur.

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EDWARD O'FLAHERTY AND WIFE, Respondents, v. THE UNION  
RAILWAY COMPANY, Appellant.

1. *Damages, measure of—Actions for—Care and diligence to be exercised by defendant.*—It is the established doctrine of the Supreme Court that, in an action for damages on account of negligence or unskillfulness, it should be left to the jury to say whether, notwithstanding the imprudence or neglect of the injured person, the defendant could not, in the exercise of reasonable care and diligence, have prevented the injury.
2. *Damages—Negligence—Care and prudence to be exercised by infants.*—The same rigid rule in determining what would be a bar to an action on the ground of contributory negligence, would not be applied to an infant, an idiot, or an insane person, as to one who had arrived at an age to possess ordinary judgment and discretion. All that is necessary to give a right of action for an injury inflicted is that the injured person shall have exercised care and prudence equal to his capacity.
3. *Damages—Prudence to be exercised by parents.*—To constitute negligence in parents, there must be an omission of such care as persons of ordinary prudence exercise and deem adequate in the care of children.

*Appeal from St. Louis Circuit Court.*

*Cline, Jamison & Day*, for appellant, cited *Wright v. Malden Railroad Co.*, 4 Allen, 283; *Trow v. Vermont Central Railroad*, 24 Verm. 487; *Buggs v. Taylor*, 28 Verm. 180; *Lucas v. New Bedford & T. R.R. Co.*, 6 Gray, 64; *Gilman v. Deerfield, etc.*, 16 Gray, —; *Garrell v. Manchester, etc.*, 16 Gray, —; *Gallagher v. Boston, etc.*, 1 Allen, 187; *Todd v. Old Colony, etc.*, 3 Allen, 21; 36 Mo. 484; *Holly v. Boston Gas-Light Company*, 8 Gray, 123; *Hatfield v. Roper*, 21 Wend. 615; *Lehman v. Brooklyn*, 29 Barb. 236; *Boland and Wife v. Missouri Railroad Company*, 36 Mo. 484; *Bliss v. Hibbraham*, 8 Allen, 564; *Haley v. Earle*, 30 N. Y. 208; *Pool v. North Carolina Railroad Company*, 8 Jones' L. R. 340.

*McBride*, for respondent, cited *Huelsenkamp v. The Citizens' Railway Company*, 34 Mo. 45; same case, 37 Mo. 554; *Boland and Wife v. Missouri Railroad Company*, 36 Mo. 484; *Meyer v. Pacific Railroad Company*, 37 Mo. 151-4; *Liddy v. St. Louis Railroad Company*, 40 Mo. 506; *id.* 153; *Morrissey v. Wiggins Ferry Company*, 43 Mo. 380.

WAGNER, Judge, delivered the opinion of the court.

This was an action by plaintiffs, as parents, to recover from defendants, an incorporated street railroad company, the statutory penalty of \$5,000 for killing their child, a little girl aged about two years and eight months. The evidence shows that the accident occurred on Carr street, in the city of St. Louis; that the mother of the child dressed it, and sent it, under the protection of an elder sister about eight years of age, to a lot across the street to play and get fresh air; that after being there for a time the child, unobserved by its elder sister, escaped and undertook to make its way home across the street. While crossing the street, and on the railway track, one of defendant's cars came along and ran over it, completely crushing its skull. It is also most clearly established by the testimony that the car was being driven at a rapid rate. Some of the witnesses say that the team was running; others, that it was going at a very fast trot, and that the driver, instead of looking ahead and having his hand on the brake, in order to avoid accidents, was looking behind through the car, and holding on the dashboard to maintain his position. When the car was from thirty to fifty feet distant from the child, there was a woman looking out of an upper story window on the street, who saw the danger and cried out, trying to give the alarm to the driver; but his mind was diverted to another direction, and no effort was made to stop the car till the child was run over and killed outright. It further seems that the street over which the car was traveling was an up-hill grade, and had the car been driven with proper speed, and had the driver exercised prudence, management and care, the accident might easily have been avoided and the child's life saved.

On behalf of the plaintiff, the court, in substance, instructed the jury that if the child's death was caused or occasioned by the negligence, carelessness, or unskillfulness of the driver, servant, or employee of the defendant whilst running its car on the railroad, and whilst the same was in his charge as driver, and without negligence on the part of the child or its parents, then the jury should find for the plaintiffs; that, although the jury might believe

from the evidence that the plaintiffs or their deceased child were guilty of neglect or imprudence which contributed remotely to the death of the child, yet if the servant, employee, or driver of the defendant was guilty of misconduct or carelessness in the management of the defendant's car, which misconduct or carelessness was the immediate cause of the death of the deceased, and with the exercise of ordinary prudence and care on the part of said servant, employee, or driver, the death of the child might have been avoided, then the defendant was liable. To these instructions the defendant at the time excepted.

For the defendant the court instructed the jury that before the plaintiffs could recover in the case, they must establish affirmatively two facts, to-wit: *First*, that the deceased child came to its death from the careless acts or conduct of defendant's agents or servants in the management of its car; *second*, that neither of the plaintiffs, nor the little girl in charge of the deceased child, nor deceased child itself, was guilty of any negligence or carelessness immediately contributing to the injury and death of the child.

The defendant asked two additional instructions. The first was that if the jury found from the evidence that the deceased child was but two years and eight or ten months old, and that it was sent upon the streets in the city of St. Louis by its mother, in charge of a sister eight years old, and, while thus attended, it was left alone upon the streets, or was permitted to go out of the yard where its sister was engaged at play, and while thus alone it attempted to cross a public thoroughfare in said city traversed by street cars and other vehicles drawn by horses, unattended by any one sufficiently near to protect it from harm, and in so doing received the injuries complained of, from which it died, then the plaintiffs could not recover. The second instruction was, in substance, that if the deceased child was but two years and eight or ten months old, and attempted to cross from the north side to the south side of Carr street, unattended by any one in charge of it or sufficiently near to it to give it aid, care and protection in crossing said street, and that said street was a public thoroughfare used for street cars and other vehicles drawn



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by horses, and that said child, while so attempting to cross said street, came in contact with the horses or car of defendant and was knocked down and run over, then these facts constituted such carelessness as would prevent the plaintiffs from recovering. The last two instructions the court refused to give, and the defendant excepted. The jury found a verdict for the plaintiffs, on which judgment was rendered, and the defendant appealed.

The instructions given for the plaintiff are wholly unobjectionable, for it is the established doctrine of this court that in an action for damages on account of negligence or unskillfulness, it should be left to the jury to say whether, notwithstanding the imprudence or neglect of the injured person, the defendant could not, in the exercise of reasonable care and diligence, have prevented the injury. The instruction given for the defendant was sufficiently favorable to it, and went as far as the prior rulings in this State on the subject would permit. But the instructions refused were based on an entirely different theory, and asked the court to declare, as matter of law, that permitting the child to go out under the circumstances as detailed was of itself negligence and would preclude a recovery.

In discussing the question of infantile responsibility in a case in this court, we held that the same rigid rule, in determining what would be a bar to an action on the ground of contributory negligence, would not be applied to an infant, an idiot, or an insane person, as to one who had arrived at an age to possess ordinary judgment and discretion. All that was necessary to give a right of action for an injury inflicted by the defendant was that the injured person should have exercised care and prudence equal to his capacity. (*Boland and Wife v. Missouri Railroad Company*, 36 Mo. 484.) The young and the old, the lame and infirm, are entitled to the use of the streets, and more care must be exercised towards them by persons controlling or managing cars and vehicles than towards those who have better powers of motion. A child or young person can not be expected to possess that vigilant foresight which would be exacted of a person of maturer years. But it does not thence follow that they are to be denied the privilege of going on the streets, and, if



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they do so go, they may be killed with impunity. In the case of a child two or three years old, no knowledge or foresight can be expected. This fact persons who traverse the streets in conducting cars are bound to know, and govern their actions accordingly. In *Mangam v. Brooklyn Railroad Company*, 38 N. Y. 455, the action was for injuries done to an infant three or four years old. The proof showed that the child was left in the house with the front door locked; that he got out into the street through the front window, and then went down one street and crossed another, in front of the mules drawing the car; that he got out of the way of the mules, but was struck by the dashboard of the car and knocked down, and received the injury; that the driver of the car had caught a pigeon, which he had in his hands, and was sitting down looking at it, having wound his lines around the brake, and was paying no attention to his team, or to what might be on the track, at the time of approaching the place of collision, nor until after the occurrence. There the inference is that the team was going along leisurely, and the driver was simply guilty of inattention; but had he been at his post, vigilantly performing his duty, the accident might and would have been avoided. Yet the court held that the child being in the street under such circumstances would not warrant the conclusion, as matter of law, that the parent was guilty of negligence, and at most the question of fact should be submitted to the jury.

I think it may be stated as a sound proposition that to constitute negligence in the parents there must be an omission of such care as persons of ordinary prudence exercise and deem adequate for the required purpose. In the present case it appears that the unfortunate little child was never permitted to go out on the streets alone, unattended, but it was frequently sent out under the care of its sister. Although the sister was but eight years old, she might have been entirely adequate to afford it protection under ordinary circumstances. It is the only attendance many people are capable of affording their children. To say that it is negligence to permit a child to go out to play unless it is accompanied by a grown attendant, would be to hold that free air and

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exercise should only be enjoyed by the wealthy who are able to employ such attendants, and would amount to a denial of these blessings to the poor.

The evidence is clear that the driver was guilty of the most reckless misconduct and criminal disregard of human life. Had he been driving in moderation, and attentive to those duties which his situation demanded, this accident could never have happened. But the whole question was fairly submitted to the jury, and they have passed upon it by their verdict. That verdict can only be disturbed by attempting to withdraw this case from the operation of the established law of this State, and we do not feel particularly called upon to invent new rules for the purpose of screening and protecting wrong-doers. I think the judgment is right, and therefore advise an affirmance.

Judgment affirmed. The other judges concur.

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THE COUNTY OF MARION, Defendant in Error, v. WILLIAM B. PHILLIPS, Plaintiff in Error.

1. *Courts, County, allowance of claim by—In what case not res adjudicata.*—

The action of a County Court in allowing a claim of the county collector against the county, through a mistake of fact, is not *res adjudicata*, so as to bar a suit by the county to recover back the amount allowed. In such case the judges of the court acted merely as the fiscal agents of the county, and their mistake might be inquired into and corrected, as well as those of an individual acting in his own behalf.

*Error to Sixth District Court.*

*Dryden, Lindley & Dryden*, with *Lipscomb & Anderson*, for plaintiff in error.

I. The action of the court in the case at bar was judicial. (The State v. Cooper County, 17 Mo. 507; Sullivan County v. Burgess, 37 Mo. 300; Jones v. Brinker, 20 Mo. 87; State, use of, etc., v. Rowland, 23 Mo. 98.)

II. The judgment of a court of competent jurisdiction can be impeached for fraud only. (Sullivan County v. Burgess, *supra*,

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Jones v. Brinker, *supra*; State, use of, v. Rowland, *supra*; Oldham & Broadus v. Tremble, 15 Mo. 225; Beebe v. Bank of New York, 1 Johns. 555; Stanton v. Edwards, 1 Ves. Jr. 134; Ash v. Rogle, 1 Vern. Ch. 367.)

*Boulware, Redd & McCabe*, for defendant in error.

The entry of June 13, 1865, was not a judgment in form or legal effect. (3 Blackst. Com. 395-8; Gen. Stat. 1865, ch. 171, § 1, and ch. 137, §§ 9, 11; Sparks v. Purdy *et al.*, 11 Mo. 225; State v. Cooper County Court, 17 Mo. 510; Boggs v. Caldwell County, 28 Mo. 589; Hann. & St. Jo. R.R. v. Marion County, 36 Mo. 303.)

BLISS, Judge, delivered the opinion of the court.

The defendant had been sheriff and tax collector of Marion county, and on the 13th of June, 1865, he, as such collector, settled with the County Court, and the settlement was entered upon its records in the usual manner. In making this settlement the credits contained the following item: "By amount delinquent list allowed by County Court at date, \$14,362.22." This amount was credited to him upon his account of collections for the county revenue, and it was afterwards discovered that the total amount of delinquencies upon the levy for county taxes was only \$5,967.72, and that the balance for which he had been credited consisted of the delinquent list for the State revenue, which balance should have been and was also credited to him in his settlement with the State auditor. Thus the defendant received a double credit of over \$8,000, once by the State correctly, and once by the county by mistake.

The county commenced proceedings in the Circuit Court in the nature of a bill in chancery to correct this mistake, and recovered a judgment for the amount improperly retained and interest, amounting to \$11,326. The matter is brought to this court through the District Court by error, and the only defense made is that it is *res adjudicata*; that, as the County Court passed upon it judicially, its judgment is conclusive, and the county is without remedy.

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The exact *status* of the County Court, in other than its probate jurisdiction, has not been very clearly defined. In matters of probate it is a regular court of probate, the successor, in that regard, of the ecclesiastical courts of England, and so far is a judicial body, and its proper acts in passing upon the rights and duties of parties are judicial acts. In some other matters its functions are also judicial. But many of its duties can not be so classed. The county judges are in most matters the agents and representatives of their respective counties. As a board, called the County Court, they audit claims against it, make appropriations, assess taxes, loan and distribute the school fund, take charge of its poor, direct the building and supervision of roads and bridges, erect and take charge of the public buildings, look after and settle with its financial agents, and, in general, transact the county business. Many of their acts, as in auditing claims and settling the accounts of treasurer and collector, have been sometimes called judicial, because it is incumbent on the court to decide—to adjudicate, as it were—upon the claim or account. But this decision is more like that of a party or agent than of an impartial tribunal with the parties before them. They decide very much as every private person or financial agent of a firm or corporation decides upon an account presented. They decide as all public auditors decide when claims or accounts are presented for adjustment, and if their action is judicial, then our auditor of public accounts is so far a judge, and holds a court of record; for, in auditing claims, his duties are precisely those of the County Court. This term has been applied to their action from the poverty of language, for the same reason that the word “court” has been used in so many different senses. If they had been called supervisors or commissioners, and their organization a board, as in many States, the application of this term to their action might have been less frequent. But though we sometimes so apply the term, we do not conform our action to that idea. If passing upon a claim against the county is judicial action, and its rejection a judgment against the claimant, he would be concluded by it. The matter would be *res adjudicata*; and yet suits are brought every day to recover claims rejected by the

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County Court. Their action is simply evidence that the county refuses to pay them, and is the occasion of, if not a necessary step to, the action, instead of a bar to it. I have thus spoken of the action of the court upon claims against the county, because it is clearly analogous to its action in settling with collectors, &c.

This settlement of accounts with collectors lacks one of the essential elements of ordinary judicial action, there being no parties litigant, no adverse interests to be adjusted, no one to be heard but the officer; and it also possesses one of those elements, inasmuch as it is to be made and the accounts adjusted according to law. But so are all settlements and adjustments between parties. The rules that govern do not so much decide the question as the relation of the body, whether it is to adjust controversies between parties, or whether it represents one of the parties. In considering the duties of public officers, it is difficult, if not impossible, by general definition, to draw an exact line between judicial, ministerial, and executive action, so as to apply all the legal consequences to each, principally for the reason that when we go outside of the regular courts we speak only by comparison, and apply terms originally and generally applicable to entirely different proceedings, and also for the reason that many of their duties are of a mixed judicial and ministerial character. It is less difficult, however, in a specific case to say whether the action is so exclusively ministerial as to leave no discretion in the officer, or whether it is so exclusively judicial that the action is final and can not be corrected, however gross its mistakes. In the case before us there was no mistake of law—as by giving the collector larger fees than he was entitled to, or by crediting as delinquent what he gave no lawful excuse for not having collected—but the gross blunder was inadvertently committed of adding the delinquency in the State revenue to that in the county revenue, and paying him both on behalf of the county, and at the same time certifying the State delinquency to the State authorities, by means of which he again drew its amount from the State treasury. The blunder was not one of decision; the County Court never held that he was entitled to the State delinquency from the county; it did not know that it was included in his credits.

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It was not even a mistake of computation, but a naked allowance of a gross sum the county had no right to pay, and which its officers did not suppose they were paying. There is so much of fraud in the transaction that I wonder it was not charged in the petition, for the mistake could not but have been known to the defendant. It would not then have mattered whether the settlement was a judgment or not. But counsel, perhaps wisely, have chosen a proceeding to surcharge and falsify a stated account; and if it be such an account, and not a judgment, there is clear equity in the petition. (Sto. Eq. §§ 523-6.)

I do not find in our reports any adjudication upon this question, although remarks have been made by judges that indicate their views. In *Sparks v. Purdy*, 11 Mo. 225, the act of the County Court condemned was declared to be a proceeding that "had none of the characteristics of a judicial one; there were no parties, no notice, no pleadings, no trial, no judgment." In *Hannibal and St. Joseph R.R. Co. v. Marion County*, 36 Mo. 303, the County Court is spoken of as the agent of the county. In *Sullivan County v. Burgess*, 37 Mo. 300, in a suit to set aside a settlement with a treasurer for fraud, the judge declaring the opinion, after quoting *State, to use, etc., v. Rowland*, 23 Mo. 98, concerning settlement of estates, remarks that "a settlement with a County Court is equivalent to a judgment, \* \* \* and will only be set aside when impeached by a proceeding in the nature of a bill in equity for fraud." Had this opinion been necessary to the decision of the case, I should regard it as good authority; but the court, in order to decide the case before it, had no occasion to, and did not, distinguish between settlements with guardians and administrators and with county financial officers. In New York the board of supervisors settle with the county treasurer, and in *Supervisors of Chenango v. Birdsall*, 4 Wend. 453, the Supreme Court, per Marcy, held that the county was bound by a previous settlement and adjustment by compromise of a disputed matter, but that the treasurer was still holden for an item omitted by mistake in the settlement. The board were treated as the agents of the county, and the county as bound by their acts as agents. In Illinois, in *Washington County v.*



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Parlier (5 Gilman, 232), it is expressly held that the action of the county commissioners in making settlement with the collector is not judicial. "In making this settlement," says the judge, "the commissioners act as agents of the county, and do not adjudicate as a court. They could enter up no judgment against the defendant for the balance found due, nor have they any means of enforcing payment of such balance, except by a resort to the ordinary courts of law. As the fiscal agents of the county their mistakes may be inquired into and corrected, as well as those of an individual acting in his own behalf."

We hold, then, that the defendant in the case at bar, in making his settlement with the County Court of Marion county, settled and adjusted his claims and liabilities with the public agents of the county; that the entry upon the records of the court was not a judgment at law, but the record of the results of that settlement—a statement of his account, as adjusted between him and the county—and that any mistake in that settlement clearly proved is open to correction, and in the same manner as though it were made with an individual.

The judgment of the District Court is affirmed. The other judges concur.

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WILLIAM C. TAYLOR, Plaintiff in Error, v. ELIAS E. WILLIAMS,  
Defendant in Error.

1. *Equity—Lands, sale of—Specific performance, discretion of court in enforcing.*—Whether a decree for specific performance shall be awarded in any particular case, is always a matter resting in the sound and reasonable discretion of the court, and it is held to be a reasonable exercise of this power to deny a decree when its allowance would be harsh or oppressive in its operation on either party.
2. *Contracts, specific enforcement of—Must be precise, etc.*—Contracts sought to be specifically enforced must not only be proved in a general way, but their terms must be so precise and exact that neither party could reasonably misunderstand them, and those terms must be satisfactorily established by the evidence.

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*Error to St. Louis Circuit Court.*

*Casselberry*, and *Harding & Crane*, for plaintiff in error.

*J. Wickham*, and *A. Hamilton*, for defendant in error.

CURRIER, Judge, delivered the opinion of the court.

This is a suit in equity for the specific enforcement of a contract for the sale of real estate. It is based on the stipulation contained in the following receipt, to-wit:

“Received, St. Louis, April 30, 1864, of William C. Taylor, five dollars upon account of purchase money (two thousand five hundred and fifty dollars) of a tract of land in Central township, being entry No. 1,817, James Smith, s.w. fractional section 17, and containing fifty-one acres. The title, on investigation, to be satisfactory, and a warranty deed given. The terms of said purchase are one-fourth cash, the balance in one year, with the privilege of paying the same any time before maturity; the deferred payments to be secured by deed of trust on the property. [Signed] E. E. WILLIAMS.”

Assuming that both parties were equally bound by the stipulation of this receipt, what did it bind them respectively to do? It clearly defines and identifies the property in question, and sets out definitely the terms of payment in case the proposed sale should be consummated; but it neither bound Taylor to take, nor Williams to convey, the premises unconditionally. The proposed conveyance was to be made only in case Taylor, on investigation, should be satisfied with the title. “The title,” on investigation, was “to be satisfactory” to him, or there was to be no sale. That is the plain sense of the contract; too plain to be mistaken or misunderstood. The power was vested in Taylor to determine whether the trade should go on or be abandoned, so that he did not object to the title captiously or unreasonably.

Nor was it the duty of the defendant to furnish an “abstract of title,” as claimed by one of the plaintiff’s counsel. It was the duty of Taylor to investigate for himself, and, in a reasonable time, declare the results of such investigation. He did so,

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and, finding the title unsatisfactory, so notified the defendant, as the petition itself declares. This was a notification to the defendant that the plaintiff would not, as the matter then stood, proceed further with the transaction. Had nothing further been done on either side, it could not be pretended that any adequate foundation had been laid for the desired decree, however inconvenient it might have been for the plaintiff not to possess himself of the estate in question.

The plaintiff's counsel have not ventured to rest the case on grounds so wholly insufficient. They, therefore, seek to strengthen it by the introduction of an additional element, to-wit: a new promise—a promise to “perfect the title.” There was no such undertaking in the original agreement. By that the plaintiff was to judge of the title and determine for himself whether he would proceed with the bargain. To make the new element available, the plaintiff avers in the petition that the defendant, on being informed of the defectiveness of the title as it stood, thereupon “undertook and promised to perfect the title;” that the plaintiff, in the meanwhile, relying on such new promise, held himself in readiness to take the property when the title should be made good. The attempt is to ingraft the new promise upon the old one, and thus bring it under the protection of the written agreement. The case is thus made to turn upon what of importance may be attached to this alleged new promise or engagement to “perfect the title.”

The defendant, by his answer, denies the truth of the allegations, and puts the plaintiff upon his proof. The plaintiff was the only witness offered in support of the averments. He testified that Mr. J. G. Barry was the agent of the defendant, the defendant himself being a non-resident; that he notified Barry of the unsatisfactory character of the plaintiff's title, and that Barry thereupon said that “Williams was going to Kentucky, and would perfect the title.” This is all the testimony on the subject. Barry, in his testimony, does not deny that he so said; nor does he admit it. Nor is there any testimony having the slightest tendency to show that the plaintiff's subsequent action was in any manner controlled or influenced by this supposed declaration of Barry.

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But, assuming that Barry made the statement imputed to him, what does it amount to? Was Williams bound by it? Had Barry authority, by his verbal statement or otherwise, to enlarge, modify, or change the effect of Williams' written contract? There is nothing to show that he had—nothing beyond the mere fact that he was acting as Williams' agent, in subordination to the contract? But suppose he had the largest powers, what interpretation is to be placed upon his language? Was it the expression of an opinion, the declaration of a purpose? or was it a solemn engagement, on which the plaintiff was at liberty to rely, to do the thing suggested, and at whatever risk? In my opinion, this latter construction is not warranted. The subsequent conduct of the parties does not support it. Nor is there anything in the testimony which tends to show that either party acted upon the theory that this supposed declaration of Barry's in any way affected, enlarged, or modified their respective rights, as they existed under the original agreement.

The plaintiff was fully aware, as his own testimony shows, that the defendant had no paper title to the premises in suit, and that his possessory right to the land would not ripen into a perfect title till 1868, four years after the contract of sale. Now, if the alleged variation and enlargement of the original contract of sale is to avail the plaintiff for the purposes of this action, that variation and enlargement must have this extent, namely: that the plaintiff acquired thereby the right to lie by for four years, in the meanwhile enjoying the use of the purchase money, and then, at the end of four years, when the title should be perfected by lapse of time, to acquire the property at the same rate it was bargained for four years previously, when the title was under a cloud. This would be quite advantageous to the plaintiff, and equally disadvantageous to the defendant. It is a kind of arrangement that courts of equity are never eager to enforce in the way of specific performance. Whether a decree for specific performance shall be awarded in any particular case, is always a matter resting in the discretion of the court—not an arbitrary discretion, indeed, but a sound, reasonable, judicial discretion (2 Sto., § 742); and it is held to be a reasonable exercise of this

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power to deny a decree where its allowance would be harsh or oppressive in its operation on either party. (Anthon v. Leftwich, 3 Randolph, 238.) To that effect are the authorities generally. This principle, applied to the facts of the case at bar, justifies the judgment of the court below.

That judgment is also defensible upon another ground, namely: that the proof does not establish, with sufficient clearness and certainty, the fact of a variation of the original contract, waiving the question of its competency. Failing in this, the action fails. The equivocal and unsatisfactory character of that testimony has already been adverted to. Courts of equity do not decree specific performance on the strength of such evidence. Contracts sought to be specifically enforced must not only be proved in a general way, but their terms must be so precise and exact that neither party could reasonably misunderstand them; and these terms must be satisfactorily established by the evidence. Any other rule would be of dangerous tendency. "If the contract," says Justice Washington, "be vague or uncertain, or the evidence to establish it be insufficient, a court of equity will not exercise its extraordinary powers to enforce it, but will leave the party to his legal remedy." (Colson v. Thompson, 2 Wheat. 336.) This principle is quite fatal to the plaintiff's case, in its application to the testimony by which the alleged variation or enlargement of the contract is sought to be sustained.

I discover no sufficient reason for disturbing the present judgment, and, with the concurrence of the other judges, it will be affirmed.

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A. C. MUELLER *et al.*, Respondents, *v.* THE PUTNAM FIRE INSURANCE COMPANY, Appellant.

1. *Insurance—Action on policy—Request to exhibit books, etc.—Refusal—Pleadings as to.*—In an action on an insurance policy, the condition contained in the policy, that the insured, if requested, should exhibit to the insurer, upon adjustment of loss, his books of account, invoices, etc., is not included in a general allegation by plaintiff of performance of conditions precedent to a right of recovery. Such condition can only be brought into

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the record by defendant; and if he does not tender an issue upon it, it is outside of the case. Defendant's answer having alleged demand for the books of account, etc., and refusal or neglect to exhibit them, plaintiff should deny the one or the other, or give some excuse for not complying with the demand. In such case plaintiff could not introduce evidence showing waiver by defendant of the production of books, etc., unless the waiver were pleaded in the replication.

2. *Practice, civil—Instructions—Term “gross,” when should be used in.*—An instruction using the term “gross” should not be given without some explanation of its import, especially without some testimony upon which to found it.

*Appeal from St. Louis Circuit Court.*

*Sharp & Broadhead*, for appellant, cited 35 Mo. 453-7; 20 Barb. 468-73; 2 Comst., N. Y., 507; 4 Barb. 265-6, 270-3; Kelly v. Upton, 5 Duer, 336, 341-2; Garvey v. Fowler, 4 Sandf., N. Y., 665-7; Schultz v. Duprey, 3 Abb. Pr. 252-3; 6 Johns. 339; 2 Seld. 179, 188-9; 10 Wheat. 189; 1 Johns. Ch. 117; 1 Barb. Ch. 339; Camp's Adm'r v. Heelan, 43 Mo. 591; 10 Barb. 285; 12 Barb. 573; 7 Clarke, Iowa, 422; 8 Ind. 150; 11 Ind. 288; Ang. on Fire and Life Ins. 160, §§ 127-8, note 2; 2 Arnold on Ins. 772-3, § 287; 1 Phillips on Ins. 494, § 911; *id.* 589, § 1046; Chandler v. Worcester Mut. Fire Ins. Co., 3 Cush. 328; Citizens' Ins. Co. v. Marsh, 41 Penn. St. 386, 393-5; Cleaveland *et al.* v. Union Ins. Co., 8 Mass. 308, 320-2; Ray & Grauss v. United Ins. Co., 2 Johns. 180, 187.

*Garesche & Mead*, for respondents, cited Gates v. Madison County M. F. Ins. Co., 5 N. Y. 479, and cases cited; Columbian Ins. Co. v. Lawrence, 10 Pet. 518; St. John v. American F. Ins. Co., 4 Allen, 390; F. Ins. Co. v. Powell, 13 B. Monr. 319, and cases cited; Williams v. N. E. M. F. Ins. Co., 31 Maine, 227; Huckins v. People's F. Ins. Co., 31 N. H. 247; Merch. Mut. Ins. Co. v. Butler, 20 Md. 54; St. Louis Perpetual Ins. Co. v. Glasgow, Shaw & Larkin, 8 Mo. 720; Radde v. Ruckgate, 3 Duer, 685; Gilbert v. Ham, 12 How. 455; Bauer v. Wagner, 39 Mo. 387; Voorhies' Code, ed. 1864, p. 276, notes *b.*, *c.*, *g.*; Walton v. Walton, 17 Mo. 378; Robards v. Morrison, 20 Mo. 67; Thornton v. Rankin, 19 Mo. 193; Carpenter v. Myers, 32



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Mo. 216; Mechanics' Bank v. Klein *et al.*, 33 Mo. 560; 36 Mo. 470; Singleton v. Pacific R.R., 41 Mo. 469; Carpenter v. Myers, 32 Mo. 213.

BLISS, Judge, delivered the opinion of the court.

This was a suit upon a policy of insurance issued by defendant to the assignor of plaintiffs, containing among other things a condition that the insured, if requested, should exhibit to the insurer, upon the adjustment of the loss, his books of account, invoices, etc. The policy covered the contents of a flouring mill in Perry county, occupied and run by one Schaff, the insured, consisting of flour, grain, etc., and the following are among the issues made by the pleadings.

The petition, after its description of the contract of insurance, sets forth the loss, with averments, that it did not happen from any of the causes excepted in the policy; that said Schaff duly fulfilled all the conditions of said policy of insurance on his part, and gave the defendant due notice, and furnished proof of the fire and loss, etc. The answer denied the extent of the loss, and alleged that it was the result of the gross carelessness and negligence of the insured; denied the fulfillment of the conditions of the policy; denied proper notice and exhibition of the proofs, and, among other things, set up the provision of the policy that the insured, if required, should produce their books of account, etc., for examination, and averred that they "were expressly required by the defendant to produce to him their books of account, which they neglected and refused to do." The reply put in issue all the defendant's allegations except the one concerning the requirement and neglect to produce the books of account, of which nothing was said.

The defendant claims that this omission admitted, by not traversing, the truth of the allegation, and that he should have judgment upon it; while the plaintiffs, on the other hand, insist that it was included in the general averment of performance of conditions precedent, and that defendant's allegation in

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regard to it was but a denial of the performance of that particular condition.

Is the obligation, then, to produce the books such a condition precedent as, under a system of pleadings that would require such conditions and their performance to be set out in detail, should be included in them? If included, it must be proved; and is the plaintiff called upon to make any proof in regard to it until the defendant has first set up and proved the demand for the books and their refusal? This is clearly a matter of defense. The defendant, in actions of this kind, may not desire to see the books; and if he so desires he will call for them, and, if dissatisfied with their non-production, he will set it up as a defense. Until then the plaintiff has nothing to do with the question; he only avers the performance of the conditions he is called upon to prove, and is not bound, nor will he be permitted, to anticipate and disprove the defense. This condition is not, then, included in the general allegation of performance, and can only be brought into the record by the defendant; and if he does not tender an issue upon it, it is outside of the case. Defendant having alleged the demand and refusal or neglect, the plaintiffs clearly should deny one or the other, or give some excuse for not complying with the demand. I can conceive of no other way in which the facts of the case can be put in issue. The matter involved in that issue is very important in developing the actual loss, and should be fairly met both by the pleadings and evidence.

In the trial below, against the protest of defendant, evidence was offered and instructions were given to the jury upon the verbal claim that plaintiffs were excused from the production of their books when demanded; that the defendant had waived their production. The record shows no denial of defendant's answer in regard to the books, and least of all is any waiver set up. All this evidence and this instruction were outside the record, and were clearly erroneous.

The plaintiffs claim that this allegation in regard to the books was not new matter, not matter of confession and avoidance. But the answer certainly admits the insurance and loss, and claims a non-liability in consequence of a refusal to produce the

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books of account. It could easily be thrown into the form of a special plea in bar, under the old practice. And the waiver is also new matter in avoidance of this part of the answer. It confesses the demand and refusal to produce the books, but alleges a previous waiver of their production by an adjustment of the amount of the loss without it. This waiver should have been pleaded, and the defendant had no reason to expect and could not be required to meet any evidence upon the subject if the issue was not made. (*Kelly v. Upton*, 5 Duer, 336; and see *Thomas v. Austin*, 4 Bar. 265; *New York Con. Ins. Co. v. N. P. Ins. Co.*, 20 Bar. 468; *Kelsey v. Western*, 2 N. Y. 500; *Moffatt v. Conklin*, 35 Mo. 453.)

Among the errors complained of is the refusal of the court to give the following instruction for the defendants: "If the jury believe from the evidence that the fire mentioned in the plaintiffs' petition was caused by or resulted from the gross carelessness or other gross misconduct of the insured, the plaintiffs can not recover, and the verdict should be for the defendant."

It is not necessary, in this case, to consider the multitude of decisions upon this subject, and to follow the changes of the law to its present comparatively settled condition. The record is a long one, and I have examined it carefully, and I find no evidence tending to prove such gross carelessness or negligence as, of itself, would excuse the payment of the loss. "Gross" is a very strong word, and is sometimes treated as amounting to fraud, when it would clearly furnish a defense. An instruction using the term should not be given without some explanation of its import, and especially without some testimony upon which to found it. There was testimony tending to prove that the miller was absent the night of the fire; that the mill was in charge of the insured; that he had been intoxicated during the day; and that it was run at an unusual rate of speed. Also, something indefinite was said about weakness in the machinery in the garret, and that the smut-mill, in which the fire originated, needed cleaning. If the law were now held that negligence in the assured or his servants would discharge the liability of the insurer, it would have been erroneous to refuse proper instructions upon the sub-

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ject. But negligence being recognized as one of the things insured against, and the evidence not warranting any such charge of gross dereliction as should excuse a payment of the loss, the instruction was properly refused.

The holding of the court, however, upon the question of pleading, its permission to give evidence upon a matter material to the defendant's liability, without any reply to their allegation in regard to it, was a substantial error.

The judgment is reversed and the cause remanded for a new trial, with leave to amend. Judge Wagner concurs. Judge Currier, having been of counsel, did not sit.

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JOSEPH P. VASTINE, PUBLIC ADMINISTRATOR, Respondent, v.  
PETER WILDING, Appellant.

1. *Evidence—Certificate of deposit—Manual delivery, effect of.*—A. deposited a certain fund in bank, and, as evidence of his title, took a certificate of deposit payable to his own order. His title thus acquired must be presumed to continue until a divestment of it is shown, and a mere manual delivery of the certificate to B., without indorsement, and unaccompanied with evidence of a consideration paid, would not pass the title as against A.
2. *Practice, civil—Trial—Instructions neither given nor refused, effect of.*—An instruction was asked by defendant, at the conclusion of plaintiff's case, to the effect that plaintiff was not entitled to recover on the proofs. The court took no action on the instruction, but the trial proceeded, and defendant put in his evidence: *held*, that the instruction was practically refused.

*Appeal from St. Louis Circuit Court.*

*Lackland, Martin & Lackland*, for appellant, cited *Simonds v. Oliver*, 23 Mo. 32; 2 Greenl. Ev. 34; *McEwan v. Portland*, 1 Oregon, 300; *Enriken v. Brown*, 32 Penn. St. 364; *Goodwin v. Garrison*, 8 Cal. 615; 21 Barb. 333; *Millay v. Butts*, 35 Maine, 139; 2 Pars. Notes and Bills, 438, 480; *King v. Wilson*, 2 Doug. Eng. Rep. 633; *Dugan v. U. S.*, 3 Wheat. 172; *Dollfus v. Frosch*, 1 Denio, 367; *Mattram v. Mills*, 1 Sandf. 37; *Boeka v. Nuella*, 28 Mo. 180; *Lewis v. Bowers' Adm'r*, 29 Mo. 203; *Willard v. Moies*, 30 Mo. 142.

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*Bland & Thornton*, for respondent, cited *Armory v. Delamirie*, 1 Strange, 505; *Magee v. Scott*, 9 Cush. 150; *Millay v. Butts*, 35 Maine, 139; *Smith v. Dean*, 19 Mo. 63; *Hastings v. McKinley*, 1 E. D. Smith, 277; *Billings v. Jayne*, 11 Barb. 620; *Chitty on Bills*, 204; *Billy Jones v. Witter*, 13 Mass. 305; *Newman v. Lawless*, 6 Mo. 301; *Finney et al. v. Allen*, 7 Mo. 419; *Vaulx v. Campbell's Ex'r*, 8 Mo. 227; *Johnson v. Arundel*, 34 Mo. 338.

CURRIER, Judge, delivered the opinion of the court.

This proceeding was instituted under the statute (Gen. Stat. 1865, ch. 128, §§ 17, 18) to recover possession of a certificate of deposit issued by the United States Savings Institution of St. Louis to August Berger, deceased. It was unindorsed, and reads as follows:

“ST. LOUIS, Mo., March 12, 1866.

“August Berger has deposited in this office \$1,000, payable to the order of himself on the return of this certificate, six months after date, with interest at the rate of five per cent. per annum.”

Berger died, and the plaintiff, as public administrator, took charge of his estate. The plaintiff had no knowledge of the certificate of deposit sued for until it was brought to him by the defendant, who solicited his assistance in collecting it, the bank having refused to pay it without the indorsement of Berger's administrator. The certificate had been found among the papers of Lewis Chrisner by his administratrix. Chrisner died in Belleville, Illinois, May 6, 1867. His administratrix delivered the papers to the defendant for the purpose of collection. How it came among Chrisner's papers in no way appeared, nor was there any testimony tending to throw any light upon the question of its ownership beyond what appears upon its face, and the fact of its possession by Chrisner. The plaintiff demanded possession of it as belonging to the estate of Berger; but the defendant refused to surrender the possession, claiming to hold the certificate as the property of Chrisner's estate. Upon this refusal the present proceedings were instituted.

If the title and ownership of the certificate and the fund it represented were in the plaintiff, as Berger's administrator, at the time of the demand, the defendant's subsequent possession, in opposition and hostility to the plaintiff's right, was, in the sense of the statute, unlawful, and warranted this suit. The real and substantial question for consideration, therefore, is this: Whose was that certificate of deposit? Was the title in the administrator of Berger, or was it in the administratrix of Chrisner?

The certificate itself establishes beyond controversy the fact that Berger was its original owner; that he deposited the fund, and, as evidence of his title, took a certificate of deposit payable to his own order. His title thus acquired must be presumed to continue until a divestment of it is shown; and a mere manual delivery of the paper without indorsement, and unaccompanied with evidence of a consideration paid, would not of itself pass the title. Even in case of personal chattels, as distinguished from choses in action, the presumption of ownership is with the party once shown to have had the title, until an alienation is shown; and the party relying on the fact of such alienation must prove it. So it was decided in *Magee v. Scott*, 9 Cush. 150, and that decision expresses the recognized doctrine on this subject. In commenting upon the facts of that case, Shaw, C. J., says: "It is to be regretted that the facts showing the relation of the parties and the circumstances under which the goods admitted to have been the property of the plaintiff came into the possession of the defendant, are not stated, in order to show the application of the rule of law laid down by the court. Such circumstances will usually indicate what was the nature and character of such change of possession, whether in consequence of a sale or temporary loan, or how. The plaintiff is proved to be the owner of the property, and the right of property will continue until a change proved, as by sale, lien, or voluntary loan. Whoever relies on such change must prove it; the proof lies on him. All that appears in the present case is that the property came into the possession of the defendant with the plaintiff's consent. How? On what trust or contract? This does not appear." And it was decided accordingly that the presumption of title



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in the plaintiff, founded on his original ownership, continued and prevailed over any presumption of title in the defendant arising out of his naked, unexplained possession.

The principle involved in that decision, applied to the facts of the present litigation, is decisive of the issue. The same obscurity hangs over Chrisner's possession of the certificate that hung over the defendant's possession of the personal property forming the subject of contention in *Magee v. Scott*.

Why did he have it? How? On what trust or contract? None of these questions are answered. There is nothing but the naked, unexplained possession to justify the pretensions of the Chrisner estate to ownership. If the fact of once having been the owner of personal chattels raises the presumption of a continued title, as in *Magee v. Scott*, how decisive should that presumption be in a case like the present, when the paper in dispute points out and designates the plaintiff's intestate as being the true owner, and having upon it no mark or sign suggestive of a change of title.

I have examined all the accessible authorities cited in the brief of the defendant's counsel, and I find that not one of them asserts the doctrine that the possession of an unindorsed negotiable note, bill, or certificate of deposit, payable to the order of the payee therein named, is *prima facie* evidence of title in the holder as against the payee named in the body of the instrument; the holder furnishing no extrinsic evidence of his equitable title or interest. I apprehend no such case can be found. The Missouri cases referred to raise questions of practice, and the decisions at most have but a remote bearing upon the present inquiry.

Possession is *prima facie* evidence of title when paper is made payable to bearer, as bank notes; or where, if payable to order, the paper has once been properly indorsed and put in circulation. The cases referred to by defendant's counsel are mostly of this character, or concern personal chattels.

The remark in Parsons (2 Pars. Notes and Bills, 444), that the "mere possession of an unindorsed note is *prima facie* evidence of title in the holder," is founded on *Parham v. Murphee*,

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16 Mart., La., 355, new series, vol. 4. The point involved in that case had reference to the authority of the plaintiff's attorney to make the affidavit on which a writ of attachment was sued out. It was insisted that the possession of the note sued on, although undorsed, was *prima facie* evidence that the attorney was the plaintiff's agent or attorney in fact. The court decided adversely to this claim.

Possession of undorsed negotiable paper may well be received as *prima facie* evidence as against a stranger to the title; but is the naked and unexplained possession of such paper *prima facie* evidence as against the payee therein named? It does not appear ever to have been so held, and we are not prepared to make a precedent of that character. Nor do we see any sound reason for doing so. But it is urged that the court committed error by reason of its non-action upon an instruction asked by the defendant at the conclusion of the plaintiff's case, to the effect that the plaintiff was not entitled to recover upon the proofs. The record states that this instruction was neither given nor refused; but the record also shows that the trial proceeded and that the defendant put in his evidence. The action taken was a practical refusal of the instruction. The non-action of the court, in omitting to write a refusal upon the instruction, seems to have been the result of inadvertence, and not of intention. The judgment was for the right party, and the defendant does not appear to have been injured by the error complained of. A reversal on that point is not, therefore, warranted. It is assumed in the brief of the defendant's counsel that the certificate of deposit in question is subject to the control and jurisdiction of the Probate Court of St. Clair county, Illinois. The record shows no such fact, and it is therefore unnecessary to consider whether the fact supposed is of any materiality or not.

The views presented lead to an affirmance of the judgment, which is directed. Judge Bliss concurs. Judge Wagner absent.

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Hilsdorf v. The City of St. Louis et al.

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HENRY HILSDORF, Respondent, v. THE CITY OF ST. LOUIS AND  
THE ST. LOUIS RAILROAD COMPANY, Appellants.

1. *Damages—Corporation liable for acts of agent, in what degree.*—Corporations, whether municipal or aggregate, are now held to the same liability as individuals; and if an agent or servant of a corporation, in the line of his employment, shall be guilty of negligence or commit a wrong, the corporation is responsible in damages.
2. *St. Louis, city of—Deposit of carcasses—Mayor.*—The city of St. Louis is not liable to the owner of property for damages caused by the deposit of dead mules on his premises, under an arrangement with the mayor. His action in such case was outside of his official duties, and could not bind the city.
3. *St. Louis, city of—Removal of carcasses—Power of city over acts of contractors.*—The city of St. Louis had no power to control the action of persons employed under article IX of ordinance 4894, for the removal of dead animals, under their contract; and having no such power, they could not be responsible for such action.
4. *St. Louis, city of—Removal of carcasses—Responsibility of owner for.*—The fact that the city of St. Louis has made a contract for the removal of dead animals does not exonerate the owner from any responsibility in regard to them, when that contract can not be or is not complied with; nor can the obligation he is under to let the contractor have the carcass if he does not himself appropriate it within twelve hours, if the contractor shall come for it, be construed to discharge all responsibility on his part.

*Appeal from St. Louis Circuit Court.*

*Reber*, city counselor, for appellant, City of St. Louis.

The city was not liable on the facts in evidence, and the court should so have instructed the jury. (Ang. & Ames on Corp., § 388, 8th ed.; *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479; 7 Cush. 385, 388; *Tweed v. Panama R.R. Co.*, 17 N. Y. 362; *Thayer v. Boston*, 19 Pick. 516-17; *Dozier v. German*, 30 Mo. 220.)

*Glover & Shepley*, for appellant, The St. Louis Railroad Company.

*Cline, Jamison & Day*, for respondent.

I. The railroad company was liable for the acts of Settle. (*Sto. on Agency*, § 308; Ang. & Ames on Corp., § 311; *Thayer v. Boston*, 19 Pick. 516; *Gass v. Coblenz*, 43 Mo. 377.)

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II. The city is also liable. (City of St. Louis v. Gurno, 12 Mo. 421; Mayor of N. Y. v. Bailey, 2 Denio, 433; City of Dayton v. Pease, 4 Ohio St. 80; Rhodes v. City of Cleveland, 10 Ohio, 159; Wightman v. Washington City, 1 Black, 39; Logansport v. Wright, 25 Ind. 512; Blake v. City of St. Louis, 40 Mo. 569; Browning v. City of Springfield, 11 Ill. 143; City of Pittsburg v. Grier, 22 Penn. 54; McCombs v. Akron, 15 Ohio, 474; Ross v. City of Madison, 1 Carter, Ind., 281; Nebraska City v. Campbell, 2 Black, 590.)

BLISS, Judge, delivered the opinion of the court.

In May, 1866, the stables of the St. Louis Railroad Company were consumed by fire, and some 140 mules, the property of the company, were destroyed, and their carcasses more or less burned. The weather was warm, and it became necessary at once to remove them.

By article IX of ordinance 4894, establishing and regulating the health department (revised ordinances 1866, pp. 451-3), it is made the duty of street inspectors to report to the clerk of the board of health every carcass they may find, and the clerk shall enter the report in a book, designating the locality, and the exclusive privilege is given to A. Feger and G. Futterknecht, for a period covering the time of this fire, to remove and appropriate said carcasses. These men bind themselves to remove all such animals from the city within six hours after notice, and it is made the duty of every owner of any dead animal who desires to convert it to his own use to do so within twelve hours after its death, or, if he does not desire to do so, to notify said clerk or some street inspector. The city pays nothing to these contractors, and the only consideration received by them is the privilege of converting the bodies to their own use, which is done at their manufactory of soap grease outside the city limits.

On the morning of the loss by the railroad company, the clerk of the board of health received from the company the proper notice; and one Settle, employed by the contractors to remove carcasses, appeared for the purpose of entering upon the performance of his duty, and met the mayor upon the ground. The

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fire occurred in the south part of the city, and the contractors' works are north of it, and seven miles from the place of the fire, and it became at once evident that these carcasses could not be conveyed to them. They had already become offensive, and were rapidly becoming more so, and their transportation through the city, even if it could be done at once, would have been a serious nuisance. But Settle had no means of so removing them, and informed the mayor that it would take him a week to do the whole job. The mayor then obtained a proposition from him to take them below the arsenal and throw them into the river for \$1.25 per head, which proposition was communicated to the agents of the railroad company, who assented to it, and afterwards paid Settle his bill for the work. The river was very high at the time, and overflowed a stone quarry belonging to the plaintiff so as wholly to conceal it; and finding a road to the river bank where was situated this quarry, and it being more convenient of access than where he was directed to go by the mayor, Settle threw these carcasses into the river directly over this quarry. The current did not strike them, and they sank into the quarry, and the plaintiff claims that, being mixed with and covered by the sediment that filled his excavation, he could not re-open his quarry, and thus wholly lost the use of it. He recovered a judgment, which was affirmed at general term, and defendants appeal.

The defendants made separate defenses, and after the evidence was submitted, counsel for the city asked the court to instruct the jury that, on the facts proved, the plaintiff could not recover against it. This instruction the court refused to give, and thus the question is raised whether, under the facts claimed to be proved by the plaintiff, the city is liable to him for the damage arising from the acts of Settle.

If the city is thus liable, the liability arises by virtue of its relation to the mayor and to Settle, or to one of them. The responsibility of an employer for the act of those in his service depends upon the character of those acts, and especially upon their relation to the service. It would not be right to charge him for the torts of his servant that had no relation to his employ-

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ment. The contract of service is no guarantee of general good conduct as a citizen, but any act done in pursuance of the contract of hire will in general charge the principal as well as the agent or servant. Corporations, whether municipal or aggregate, are now held to the same liability as individuals, and will not be permitted to screen themselves behind the plea that they are impersonal, and their acts are but the acts of individuals; and if an agent or servant of a corporation, *in the line of his employment*, shall be guilty of negligence or commit a wrong, the corporation is responsible in damages. (See Angell & Ames on Corporations, §§ 385-8, and the numerous cases cited in the notes.)

In the case at bar, the mayor, it appears, acted with zeal and energy to save the public from the effects of the terrible nuisance upon the premises of the railroad company. But he can not be said to have been acting on behalf of the city, but rather as a good citizen, whose other heavy responsibilities were a spur to look after the public welfare generally. The general duty of abating nuisances is imposed by article I of said ordinance 4894, especially by sections 6 and 7, upon the board of health and the street inspectors under its direction, and it does not appear that the mayor has anything to do with the matter. It is not necessary to say that an emergency could or could not arise, as if the board of health should grossly neglect its duty, and the city contractors for removing carcasses, also theirs, or there was other pressing necessity, in which the mayor, as the general executive, and by virtue of the powers given him by charter, might not so act as to bind the city, although he performed the duties of other departments. But in the present case there was no such emergency. The matter did not come before the board of health, nor does it appear that the mayor undertook to bind the city, or that he acted officially in the premises. But if he did he went beyond his authority as mayor, and his acts were not those of the city. (*Thayer v. Boston*, 19 Pick. 511.)

The city, then, if responsible at all, became so by the acts and relation of Settle; and the inquiry at once arises whether Settle had any such relation to it that it ought to be held responsible



for his negligence or wrong-doing. He was, as we have seen, in the employment of Feger and Futterknecht, the contractors for removing carcasses, and his employers held an independent contract with the city, and were in no way under the control or direction of its officers. They were bound to remove all carcasses in a specific manner, and neither the mayor nor board of health, nor any person or body representing the city, could interfere or in any manner control their acts. The common council could by ordinance terminate their contract, but during its existence had no power over them. I can not see, then, upon what principle of reason or justice the city can be held responsible for their acts.

The rule that prescribes the responsibility of principals, whether private persons or corporations, for the acts of others, is based upon their power of control. If the master can not command the servant, the acts of the servant are clearly not his. He is not master, for the relation implied by that term is one of power, of command; and if a principal can not control his agent, he is not an agent, but holds some other or additional relation. In neither case can the maxim *respondent superior* apply to them, for there is no superior to respond. The city authorities of St. Louis had no power to control the action of Feger and Futterknecht under their contract, and, having no such power, they can not be responsible for it; and such are the best authorities.

The case of *Bush v. Steinman*, 1 Bos. & Pul. 404, though followed in a few other cases, is not now generally regarded as authority. It made employers responsible for the acts of job contractors, over which they had no control, and for many years the case embarrassed the courts and caused artificial distinctions to be made, in order to reconcile it to the principles of justice. But it is now generally disregarded, and its doctrine has been expressly disclaimed by several decisions in our own State. In *Barry v. The City*, 17 Mo. 121, the subject underwent a thorough discussion, and the leading cases were reviewed by the court. The city had let a contract to build a sewer, the contractor having sole control of the job until accepted, and it was held that the city was not responsible for the negligence of the contractor in its construction, the relation of master and servant not existing.

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In *Morgan v. Truman*, 22 Mo. 533, defendant was a warehouseman, and plaintiff's goods were lost by fire caused by the negligence of a person employed by defendant in boiling the tar to make a composition roof. The responsibility of defendant was fastened upon him upon the ground that his employee, who was the overseer of the work, and hired others to work under him, was engaged by the day, and subject to the constant control of the defendant. The case was distinguished from those where the work had been let by the job, where it was admitted no such responsibility would have been incurred.

The suggestion that Settle did not remove these carcasses under this contract of his employers, but by special direction of the mayor, only brings us back to the first proposition, that the mayor had no authority to give any such direction; nor does it appear that he acted officially, but, as we shall presently see, effected between Settle and the railroad company an arrangement for their removal. The liability of the railroad company for the negligence or wrongful act of Settle was found by the jury, upon the fact that he was directly employed by the company to remove the nuisance. The instructions given by the court were very favorable to this defendant, and had not the city been included in the judgment, there would have been no error in the record. The mayor testifies that before making any arrangements with Settle, he obtained his price for the removal, went to the office of the company, and the officer in charge acceded to the terms, which were at once communicated to Settle, and, after the job was done, paid the price agreed upon, including the carriage hire of the mayor. Could any employment and service be made clearer? But the president of the company testifies that the payment of this bill was a gratuity; that they paid it to please Mr. Thomas, who had been kind to them. This view argues a singular insensibility to their obligations in the premises. In consequence of the company's misfortune, a great nuisance was created upon their premises. This nuisance they were under an imperative obligation to remove. It was rapidly becoming intolerable, would soon have driven every person out of the neighborhood, and the company would have been responsible for

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the damage suffered. The fact that the city has made a contract for the removal of such nuisances does not exonerate the owner from responsibility in regard to them, when that contract can not be or is not complied with; nor can the obligation he is under to let the contractor have the carcass if he does not himself appropriate it within twelve hours, if the contractor shall come for it, be construed to discharge all responsibility on his part. The company but performed a plain duty in employing Settle to remove the carcasses. The railroad company, then, made such an arrangement for the removal of their dead stock as they were bound to do; they honestly paid for the work, the person employed became their servant, and they were responsible for the negligent manner in which he performed the job, and for any wrong committed in the course of the business in which he was employed.

The judgment being against both the city and the railroad company, when it should have been against the railroad company alone, is reversed and the cause remanded. The other judges concur.

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COLLINS & HOLLIDAY, Appellants; v. D. E. MOTT, Respondent.

1. *Mechanics' lien—Leasehold estate does not extend to boilers or engines.*—Sections 2 and 4 of the act concerning mechanics' liens (Gen. Stat. 1865, ch. 195) extended the lien to a building erected by a tenant upon leased premises with power of removal, but not to engines and boilers erected by him thereon. The term "improvement," as used in that act, is synonymous with "building," and does not include engines and boilers.
2. *Mechanics' lien—Meaning to be attached to decision in Koenig v. Mueller.*—The decision in Koenig v. Mueller, 39 Mo. 165, was not intended to assert that no improvements which could be removed from the leased premises are subjects of a mechanics' lien, but only that when the building belongs to the landlord, in selling the tenant's term, his movable improvements should not pass.

*Appeal from St. Louis Circuit Court.*

*Ewing & Holliday*, for appellants.

*Madill*, and *Crews*, *North & Laurie*, for respondent.

BLISS, Judge, delivered the opinion of the court.

One Greenwood and others were the lessees of a building which had been converted into a mill for making kiln-dried corn meal; everything belonged to them but the naked buildings and ground. The plaintiffs furnished labor and materials, and made repairs upon the machinery and improvements belonging to the lessees; filed their accounts to perfect their lien; obtained judgment, sold and bid in the property in controversy. Defendant held a mortgage upon the same property, and the controversy is between their respective claims. The specific articles in dispute are the steam boiler and engine, and it is conceded that if the mechanics' lien attached to this property, the plaintiff's claim should prevail. The defendant claims that they are not subject to the plaintiff's lien, because, first, it could not attach to that description of property; and, second, the labor and materials were not furnished and bestowed upon them, but upon other parts of the mill.

Section 4, chapter 195, Gen. Stat. 1865, concerning mechanics' liens, attaches the lien to the interest of the lessee, in leased premises; but in that and the preceding sections it is confined to the building, erection, and improvement, including the land, if the work is done for the proprietor. The mechanic holds his lien for work, materials, fixtures, engine, boiler, and machinery done and furnished by him, but, in describing the property upon which such lien is held, no terms are used which can include such engine, etc., unless they have become part of the realty, when the lien, of course, would cover them. The cases cited by the plaintiff from Pennsylvania only go to that extent; and the same court, in *Haworth v. Wallace*, 14 Penn. 118, and in *Church v. Griffith*, 9 Penn. 117, held that trade fixtures and buildings, removable by the tenant, were not subject to the mechanics' lien under the statute. This lien is statutory, and the decisions in each State must conform to its own statute. Thus, in *Ombony v. Jones*, 19 N. Y. 234, upon a statute providing that when labor and materials are furnished for a building, by contract with the owner thereof, the person furnishing them shall hold a lien upon

the building and the lot to the extent of the interest of such owner, it was held that the lien covered a building erected by a tenant upon leased premises with the power of removal.

Sections 2 and 4 of our statute are intended to cover just such a case, and to facilitate the enforcement of the lien, but do they go further? If the improvements bought by the purchaser at the sale upon the lien are intended to extend to the engine and boiler, why are they not mentioned? They are specifically described when reference is had to the labor and property furnished to secure which a lien is created, but are omitted in naming the property to which a lien attaches. The materials spoken of in section 1 are materials "for any building," and all that is holden is the "building or other improvement erected or materials furnished," and afterwards the purchaser is spoken of as "the purchaser of the building and leasehold term," "purchaser of the improvements," and the payment of the rent is provided for "to the time of removing the building," thus using the terms "building" and "improvements" as synonymous, and excluding the idea that the engine and boilers were included.

This statute is of gradual growth, and its first aim was to fasten a lien upon the realty for work upon the buildings. In enlarging its scope and operations, by extending it to leasehold property, the idea of holding nothing but buildings and improvements upon them seems still to prevail. The remark of the judge who delivered the opinion in *Koenig v. Mueller*, 39 Mo. 165, cited by defendant, may be too broad as a general proposition, though it was correct in its application to that case. It was not intended to assert that no improvements which could be removed are subjects of a lien, for section 4 provides for just such liens, but only that when the building belongs to the landlord, in selling the tenant's term, his movable improvements should not pass.

The judgment of the Circuit Court is affirmed. The other judges concur.

JAMES A. CANTWELL *et al.*, Respondents, *v.* CHARLES MASSMAN  
*et al.*, Appellants.

1. *Mechanics' lien, action on — Continuous delivery — Statutory limitation.*—

In suit on a mechanics' lien, the petition alleged that between certain dates plaintiffs delivered divers material to defendants. The first delivery was more than six months anterior to the filing of the lien: *held*, that a fair construction of this averment was that the sales and deliveries were continuous between the dates mentioned, and that the whole account was brought within the statutory limit of six months. (Gen. Stat. 1865, ch. 195, § 5.)

*Appeal from St. Louis Circuit Court.*

*Bakewell & Farish*, for appellants.

*H. A. Haeussler*, for respondents.

CURRIER, Judge, delivered the opinion of the court.

This is a proceeding to enforce a mechanics' lien. The petition avers that the plaintiffs, between the 1st of March, 1868, and the 28th of April, 1868, sold and delivered to three of the defendants a boiler and other articles, describing them, which are alleged to have been used in the erection of a distillery of the purchasers.

Two of the defendants answer, and set up as an affirmative defense the fact that the articles in question were sold at the agreed price of \$315, and that the "defendants paid on account thereof the sum of \$50, and closed the account by giving them a note for the balance." It is then alleged that the note had been sued on, and became merged in a judgment.

The allegation of the petition as to the time when the articles were sold and delivered is not denied; nor does that point appear to have been in the mind of the pleader when drawing the answer. The defense was rested on other grounds.

At the trial, the court instructed that the "plaintiffs had six months, after the delivery of the last article in their count, in which to file their lien." Was that instruction warranted? That is the only point in the case requiring notice.

The instruction assumes that the first and last items in the



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account had such connection as to make, with the intervening items, a connected whole, one job. The instruction involves this assumption for the reason that the first delivery was more than six months anterior to the filing of the lien, as is shown both by the evidence and the pleadings, and could not, therefore, come within the provisions of the statute (Gen. Stat. 1865, p. 766, § 5) unless it had a connection with the subsequent deliveries.

Had the fact assumed rested upon conflicting testimony, it would clearly have been the duty of the court to have submitted the point to the determination of the jury. But the fact did not rest upon the testimony, since it stood admitted by the pleadings. No issue is made as to the time of sale and delivery. The petition avers that the articles in question were sold and delivered "between the 1st of March and the 28th of April, 1868," and the answer does not deny it. The averment is material, and the fair construction of it is that the sales and deliveries were continuous, commencing on the 1st of March and ending the 28th of April. (*Driesbach v. Keller*, 2 Penn. St. 77.) It is also alleged that all the articles sold were for one and the same erection.

This brings the whole account within the statutory limit of six months. As these allegations are not denied by the answer, they must be taken as admitted. The instruction, therefore, was predicated upon an admitted state of facts, and gave the law arising upon those facts correctly.

With the concurrence of the other judges, the judgment will be affirmed.

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WESTERN BOATMEN'S BENEVOLENT ASSOCIATION, Respondent, v.  
GEORGE C. WOLFF, Appellant.

1. *Promissory note—Indorsement—Proof of demand—Character of indorsement, question for jury.—Prima facie*, a party who writes his name on the back of a promissory note, of which he is neither payee nor indorsee, is to be treated as the maker of the note, and the payee is entitled to recover of him, without proof of demand on the maker and notice of non-payment. The question in what character he put his name on the back of the note was, in case of suit against him on the note, one of fact, exclusively for the jury.

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*Appeal from St. Louis Circuit Court.*

This suit was brought on a note made by one Hugh Davis to the order of respondent, and the defendant wrote his name on the back of the note, of which he was neither payee nor indorsee.

*Colvin & Higdon*, for appellant.

While the appellant is *prima facie* a co-maker, it is competent to show by parol evidence that the signature was affixed only as indorser. (*Powell v. Thomas*, 7 Mo. 492; *Lewis v. Harvey*, 18 Mo. 74; *Perry v. Barrett*, *id.* 140; *Baker v. Block*, 30 Mo. 225.)

*Garesche & Mead*, for respondent.

Appellant having written his name on the back of the note, of which he was neither payee nor indorsee, is to be treated as a maker of the note. (*Lewis et al. v. Harvey*, 18 Mo. 74; *Baker v. Block*, 30 Mo. 225.)

WAGNER, Judge, delivered the opinion of the court.

*Prima facie*, a party who writes his name on the back of a promissory note, of which he is neither payee nor indorsee, is to be treated as a maker of the note, and the payee is entitled to recover of him without proof of demand on the maker and notice of non-payment. (*Powell v. Thomas*, 7 Mo. 440; *Hooper v. Pritchard*, *id.* 492; *Lewis v. Harvey*, 18 Mo. 74; *Baker v. Block*, 30 Mo. 225.) The note was presumptive evidence of the defendant's undertaking as a maker, and he introduced himself as a witness, and gave evidence tending to show that he placed his name on the back of the note as indorser, and not as maker. The trial was before the court, and no instructions were asked for or given by either party. There is no point of law saved which this court can pass upon.

In what character the defendant put his name on the back of the note, was a question of fact within the exclusive province of the trial court to determine, and we will not undertake to weigh the evidence. The verdict and judgment, therefore, can not be disturbed.

Judgment affirmed. The other judges concur.

THOMAS G. LANSDEN *et al.*, Appellants, v. JOHN MCCARTHY,  
Respondent.

1. *Contract—Assignment—Inducement—Trust and confidence.*—Where a contract may have been founded in personal trust and confidence, the assignee thereof can not recover upon it without the consent of the party contracting with his assignor, to the assignment.

*Appeal from St. Louis Circuit Court.*

*Rankin & Hayden*, for appellants.

The contract was assignable. (North v. Turner, 9 Serg. & Rawle, 248; More v. Mazzini, 32 Cal. 92; Hay v. Smith, 49 Barb. 360; Merrill v. Grinnell, 30 N. Y. 594; Jorden v. Gillen, 44 N. H. 424.)

*J. F. Conroy*, for respondent.

I. The contract was executory, and could not legally be assigned to appellants. (Robson & Sharpe v. Drummond, 2 Barn. & Adol. 303; Leahey v. Dugdale's Adm'r, 27 Mo. 439.)

II. The contract was personal in its character, and, as such, could not be assigned to appellants without the consent of respondent. (Robson *et al.* v. Drummond, *supra*.)

CURRIER, Judge, delivered the opinion of the court.

The question here arises upon a demurrer to the petition. The petition shows substantially that the defendant, on the 31st of May, 1864, entered into a written contract with Bedard & Knickerbocker, the plaintiffs' assignors, by which he agreed to furnish to them, at the St. Charles Hotel, in Cairo, Illinois, all the fresh beef, pork, and mutton that might be ordered and required by said Bedard & Knickerbocker or their agents, for the use and consumption of said hotel, for the year then next ensuing, at ten cents per pound, Bedard & Knickerbocker on their part agreeing to pay for the meat so furnished promptly at the end of each successive month during the continuance of said contract.

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The petition further shows that the plaintiffs became the proprietors of said hotel on the first of January, 1865, and took an assignment of said meat contract; and that the same was assigned and turned over to them for value, the defendant being notified thereof, and required to continue his deliveries of meat to the plaintiffs, as he had previously done to the plaintiffs' assignors, which the defendant refused to do, although the plaintiffs were willing to assume and perform all the stipulations of said contract obligatory upon their assignors.

The point taken by the demurrer is that the contract sued on was not assignable without the consent and concurrence of the defendant. The plaintiffs' counsel admit the proposition that where an executory contract is founded upon trust and confidence reposed in the character and skill of a particular person, as where an author contracts to write a book, or an artist contracts to paint a picture, the contract is not assignable by the party in whom such trust and confidence is reposed. The principle involved in this concession is fatal to the plaintiffs' case; for the defendant's estimate of the solvency and pecuniary credit and standing of the plaintiffs' assignors may have constituted an important inducement to the contract, without which he never would have entered into it. There was a credit given. The meat was not to be paid for on delivery, but at the end of the successive months, involving credit to an indefinite amount. The amount of meat to be furnished during any given month was not optional with the defendant, but was to be determined by the hotel proprietors, in view of the wants and convenience of the hotel. The contract imposed no obligation upon the defendant to accept as his debtors any other parties than those with whom he contracted. Nor was he under any obligation to experiment for a month, and determine at the end of it whether he would go on with the contract, according as he should or should not succeed in securing prompt payment. He was willing to give Bedard & Knickerbocker credit; but it does not thence follow that he was willing to give credit to the plaintiffs, even for a month or any part of it. Whether or not he would do so, was a question for him alone to determine. (He could not be forced into it against

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his will, by an assignment of the contract, without his consent.)

*Robson v. Drummond*, 2 Barn. & Adol. 303, is analogous to the case at bar. In that case one Sharpe, a coachmaker, contracted to furnish the defendant a carriage for the term of five years at a given price per year, payable in advance. At the end of three years Sharpe assigned his contract to his secret partner, Robson, the partnership being unknown to the defendant. The defendant refused to continue the contract with Robson. An action was brought in the name of Robson & Sharpe to recover the stipulated price for the last two years of the term, and it was held that the action could not be sustained. On the decision of the case, Littledale, J., said: "I am disposed to think there was no objection to Robson & Sharpe suing on a contract made by Sharpe only, on behalf of himself and partner; but as to the other point, I think this contract was personal, and that Sharpe having gone out of the business, it was competent for the defendant to consider the agreement at an end. He may have been induced to enter into the contract by reason of the confidence he reposed in Sharpe." In the same case Lord Tenterden, C. J., observed: "Now the defendant may have been induced to enter into this contract by reason of the personal confidence which he reposed in Sharpe, and, therefore, have agreed to pay money in advance."

Precisely the same point arises in the case now under consideration. The defendant may have been willing to deliver his meats in advance of payment, by reason of the confidence he reposed in the credit and solvency of the parties with whom he originally contracted. The readiness and offer of the plaintiffs to pledge themselves to a faithful performance of the stipulations of the contract, obligatory upon their assignors, is not to the purpose. It does not meet the exigency of the case. The question presented was one of personal trust and confidence, which it was the right of the defendant to decide for himself.

The judgment of the Circuit Court sustaining the demurrer is affirmed. The other judges concur.

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Lingle et al. v. The National Ins. Co., Hogan, stockholder.

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BENJAMIN R. LINGLE *et al.*, Respondents, *v.* THE NATIONAL INSURANCE COMPANY, JOHN HOGAN, STOCKHOLDER, Appellant.

1. *Insurance companies — Motion for judgment against stockholders — President, purchase of judgments by.*—In case of motion against the president of an insolvent insurance company, as stockholder therein, for the amount of an unsatisfied judgment against the company, he will not be allowed to offset the face of a judgment against the company, purchased by him while president, on speculation, but only the sum actually paid by him for the same. In such case the company's interests and his were identical. Public policy and morality alike forbid the chief managing officer of a company in such a manner to speculate for his private gain.

*Appeal from St. Louis Circuit Court.*

*Terry & Terry*, and *S. Reber*, for appellant, cited *City and County of St. Louis v. Alexander*, 23 Mo. 528; *R. M. Carlton*, 260, 265.

*Hudgens & Son*, for respondents, cited *Gen. Stat.* 1865, p. 329, § 19; 36 Mo. 523; 28 Mo. 106; 3 Hill, 190; 8 Bos. 396; 33 Mo. 377; *Barb. on Parties*, 361-2; 7 Paige, 18; 8 Paige, 33; 1 Chit. Pl. 40 *et seq.*; *Pearson v. Nesbitt*, 1 Dev. 315.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding to recover of John Hogan, a stockholder in the National Insurance Company, the amount of a judgment obtained and held by the respondents against said company. It seems that Hogan was president of the company, and owned stock to the amount of three thousand dollars, which he paid by his services as such officer. Whilst so acting as president, the company became insolvent, and Nixon & Co. brought suit against it for \$4,500, the amount of a policy they held against it. During the pendency of the suit, Hogan negotiated for the claim, and procured an assignment of it to him for the sum of \$675, and then let judgment go against the company for the full amount.

Execution on respondents' judgment against the company was duly returned, no property found, and a motion was then made, according to the provisions of the statute, for judgment against



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Hogan as a stockholder. This motion he resisted, on the ground that he had paid all that he was liable for, and claimed the \$4,500, the whole amount of the Nixon judgment, as among the credits to which he was entitled. The Circuit Court allowed him a credit for \$675, the amount he actually paid, but refused to allow him \$4,500, the face of the Nixon judgment, and then found against him for the amount of the respondents' debt. From that decision he appealed. It seems to me that the judgment of the court below was clearly right. At the time Hogan purchased the judgment he was president of the company, and acting for the company. The company's interests and his, in the transaction, were identical, and could not be separated. Whatever advantage he gained inured to its benefit. To permit the chief managing officer of a company in such a manner to speculate for his private gain, would be detrimental to the company and the other stockholders, and would lead to fraud, injustice, and wrong. Public policy and morality alike forbid that such a proceeding should be sanctioned. It is true that, in ordinary cases, no person would have a right to complain of the transaction but the company who suffered by the acts of its officer. But, in a case like this, the creditors whose rights are impaired should be permitted to make the objection. The true meaning and intent of the law was that the shareholders should be responsible, in a certain amount, to those who had trusted the company; and if such transactions as the record here discloses were permitted, the object and reason of the law would be evaded or totally defeated, and the stockholders would escape the measure of their liability. The court below allowed Hogan \$675, the amount he actually paid out, and that was all he was entitled to; the balance belonged to the company, and formed a part of its assets.

With the concurrence of the other judges, the judgment will be affirmed.

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Ranney, Adm'r of Walls, v. Thomas et al.

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W. E. CHADWICK, Respondent, v. ABEL F. BUMPUS, Appellant.

1. *Practice, civil—Evidence—Verdict.*—This court will not pass on the propriety of a verdict where the evidence is conflicting.

*Appeal from Fourth District Court.*

*Ellison & Ellison*, for respondent.

*G. Blair*, and *Barron & Miller*, for appellant.

CURRIER, Judge, delivered the opinion of the court.

This suit originated before a justice. On appeal to the Circuit Court, the plaintiff recovered a verdict and judgment for \$14.55. The defendant appealed to the District Court, where the judgment was affirmed, and the cause is now brought here for review.

In the Circuit Court the case was submitted to the jury, upon the evidence, without instructions. The only question sought to be raised here, upon the record, relates to the propriety of the verdict. The evidence bearing upon the issues of fact was conflicting; possibly preponderated largely against the verdict. But that is a matter this court will not look into. The point has been too recently and frequently passed upon to require any citation of authorities.

Let the judgment be affirmed. The other judges concur.

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WM. C. RANNEY, ADMINISTRATOR OF EDWARD WALLS, Respondent, v. ELIJAH THOMAS *et al.*, Appellants.

1. *Practice, civil—Actions—Replevin—Testimony as to value of property—Dismissal of suit, when allowed.*—Plaintiff in a replevin suit will not be allowed to dismiss his suit before the hearing of testimony as to the value of the property delivered to plaintiff. (*Berghoff v. Heckwolf*, 26 Mo. 512.)
2. *Practice, civil—Judgment—Exceptions, when to be taken.*—When no exception was taken to the acts or rulings of court prior to judgment, it is too late to initiate objections to such acts or rulings afterward.
3. *Practice, civil—Actions—Replevin—Administrator—Judgment against, how levied.*—Where plaintiff brings suit in replevin as administrator, and judgment is rendered against him, it should be entered against him in his official character, to be levied out of the testator or intestate.

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Ranney, Adm'r of Walls, v. Thomas et al.

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*Appeal from Second District Court.*

*Brown & Gilroy*, for appellants, cited 19 Mo. 642; 20 Mo. 276; 21 Mo. 437, 443; 31 Mo. 502, 532; 24 Mo. 524; 33 Mo. 577; 37 Mo. 338; 33 Mo. 405; 30 Mo. 620; 8 Mo. 234, 656; 14 Mo. 367; 26 Mo. 122; 25 Mo. 415; 9 Mo. 351; 18 Mo. 103, 106; 31 Mo. 257; *Collins v. Hough*, 26 Mo. 152; 30 Mo. 357; *Berghoff v. Heckwolf*, 26 Mo. 514.

*Jones & Davis*, for respondent.

CURRIER, Judge, delivered the opinion of the court.

This is a replevin suit. Under an order of the court the property in dispute, or a portion of it, was taken from the defendants and delivered over to the plaintiff. In the progress of the case a demurrer to the petition was sustained. Leave to file an amended petition was thereupon granted, but no further petition was ever filed, and the plaintiff subsequently moved the court to dismiss the suit. This, however, in that stage of the proceedings, was not allowable. (*Berghoff v. Heckwolf*, 26 Mo. 511.) The court, therefore, without, so far as appears, taking any action upon the plaintiff's motion to dismiss, proceeded to hear evidence in regard to the value of the property which had been delivered into the hands of the plaintiff, and to assess the defendants' damages. The hearing resulted in a judgment, which was entered of record against the plaintiff *de bonis propriis*—that is, as a judgment to be satisfied from his own property. After judgment the plaintiff submitted a motion for a new trial, which was overruled.

Various reasons are therein assigned for setting aside the judgment. But it was too late to initiate objection to the prior acts and rulings of the court which are complained of in the motion. (*Dozier v. Jerman*, 30 Mo. 220.) No exception had been taken to any action of the court prior to the judgment. No declarations of law were either asked or given, nor was any part of the testimony preserved in the bill of exceptions. The case is barren of points available to the plaintiff, in this court, as respects

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the acts and rulings of the court prior to the entry of judgment. But it is objected that the judgment itself is erroneous, as being rendered against the plaintiff *de bonis propriis*, whereas it should have been *de bonis testatoris*—that is, a judgment against the plaintiff in his representative character, to be satisfied out of the assets of the intestate. This point is well taken. The plaintiff was suing in his representative character, and the adverse judgment against him should have been entered as though he had been sued in that capacity. There are exceptions to the rule, as in cases of *devastavit*; but ordinarily, where an administrator sues or is sued in his official character, the judgment should be entered against him in the same character, to be levied out of the assets of the testator or intestate. (Bingham on Judgments, 89 in 11 Law Library, 37; Laughlin v. McDonald, 1 Mo. 684; Finney v. State, to use, etc., 9 Mo. 225.) The error in the judgment, however, is susceptible of correction. Therefore, the judgment of the Cape Girardeau Court of Common Pleas and of the Second District Court are both reversed; and this court, proceeding to enter up such judgment as the Common Pleas Court ought to have rendered, directs a judgment *de bonis testatoris* against Ranney, the original plaintiff. Costs will be taxed and allowed the same as though the judgment of the District Court were affirmed. The other judges concur.

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ELIAS C. STEWART *et al.*, Appellants, v. WILLIAM STRINGER  
*et al.*, Respondents.

1. *Sheriff's return—Amendment, when granted.*—An amendment of a sheriff's return, made after judgment, can not be permitted when it has the effect of rendering the judgment erroneous; but an amendment in aid of the judgment, in furtherance of justice, is allowable.
2. *Sheriff's return—Amendment and vacation of, when permissible.*—Where an amendment to a sheriff's return, touching service of summons on defendant, was allowed and vacated at the same term of court, and long after judgment and sale thereunder, and the making and vacation of the amendment left the *status* of the parties unchanged, the court had power to order the vacation.

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*Appeal from Sixth District Court.*

*Orrick & Emmons*, and *Lewis & Bruere*, for appellants, cited *White River Bank v. Downer*, 29 Verm. 332; *Newhall v. Provost*, 6 Cal. 85; *Reynolds v. Davis*, 5 Sandf. 267; *Green v. Clark*, 13 Barb. 57; *Jackson v. Ashton*, 10 Pet. 480; *Chambers' Adm'r v. Smith's Adm'r*, 30 Mo. 156; *Kitchen v. Reinsky*, 42 Mo. 427.

*Alexander and Lackland*, for respondents, cited *Corby's Assignor v. Burns et al.*, 36 Mo. 194; *Blanton v. Jamison*, 3 Mo. 52; *Dobbins v. Thompson*, 4 Mo. 118; *Waddingham v. City of St. Louis*, 14 Mo. 190-4; *Hickman v. Barnes*, 1 Mo. 158; *Stewart et al. v. Stringer et al.*, 41 Mo. 400; 9 Mo. 437; 30 Mo. 156; 4 Mo. 18; *id.* 626; 9 Mo. 437; 41 Mo. 400.

CURRIER, Judge, delivered the opinion of the court.

On the 15th of March, 1862, as the record shows, judgment by default was rendered against the defendants in the St. Charles Circuit Court. Subsequently an execution was issued and property sold in part satisfaction of the judgment.

November 14, 1865, Ruenzi, one of the defendants, moved to have the judgment set aside, assigning, as grounds for the motion, that he had a meritorious defense, and that he had never been notified of the pendency of the suit. The motion was overruled. On appeal to the Supreme Court, the judgment overruling the motion was reversed, the court holding that the sheriff's return on the original writ showed no legal service upon Ruenzi. (41 Mo. 400.)

The return was ambiguous, and while the case was pending in the appellate court, by leave of the Circuit Court, the sheriff amended the return so as to make it show clearly that Ruenzi was not served. This amendment, however, formed no part of the case as made in the appellate court. The judgment there was therefore based wholly upon the return as it was made originally.

After the case was remanded, the sheriff, by leave of court,

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and on the 14th of December, 1867, further amended the return, making it, as thus amended, read as follows: "I served this writ on Joseph W. Ruenzi by leaving a true copy of said writ at the usual place of abode of said Joseph W. Ruenzi, in the county of St. Charles, with a white member of the family over the age of fifteen years." It is apparent that the return, as thus amended, was in full and direct contradiction of the return as first amended.

On the 20th of January, 1868, and at the same term, Ruenzi moved the court to vacate and set aside the last amended return, assigning various reasons for the motion, and, among others, this: that the return, as thus amended, was false and fraudulent. Branham, the sheriff, moved the court to the same effect, and substantially for the same reasons, sustaining the motion by an affidavit, which asserted, among other things, that he signed the return without reading it, and under an entire misapprehension of its tenor. He also moved for leave to amend the return, bringing it back to the state it was in after the first and before the second amendment, which he testified would conform it to the truth of the case.

The various motions pending in the cause were heard together, and a number of affidavits read bearing upon the questions of fact involved. The motion for further leave to amend was overruled; the motion to vacate the return, as amended December 14, 1867, and the motion to set aside the original judgment as against Ruenzi, were sustained, and judgment rendered accordingly. The plaintiffs bring the case here by appeal.

Assuming the amendment of the sheriff's return of December 14, 1867 (the second amendment), to have been induced by, or to have resulted from, fraud or mistake, could the sheriff, acting under the order and permission of the court, or the court acting upon the motion of the sheriff, by an amendment of the amendment, or by an order vacating the amended return, avert the consequences of such fraud or mistake? That is the material question involved in this record.

It is to be conceded at once that an amendment of a return, made after judgment, can not be permitted when it has the effect



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of rendering the judgment erroneous; that such amendments are designed to cure and not create error; and that they must, therefore, be in affirmance and not in derogation of the judgment. (R. C. 1855, p. 1254, § 6; White River Bank v. Downer, 29 Verm. 332; Newhall v. Provost, 6 Cal. 85.) Therefore, had the original return been good, showing due service on Ruenzi, the subsequent amendment, made at his instance, showing no service, would have had no effect in invalidating the judgment already rendered, or in vitiating sales thereunder already made. It had no effect one way or the other, as it was. It was simply nugatory. It did not tend to strengthen, and it could not be allowed to impair or weaken, the judgment.

An amendment, however, in aid of the judgment and in furtherance of justice, was allowable; and the amendment of December 14, 1867, had it been allowed to stand, would have had the effect claimed for it, assuming that it showed legal service on Ruenzi. But it was not allowed to stand; not if the combined powers of the court and sheriff could overturn it.

They had no power to withdraw any of the supports of the judgment which existed at the time of its rendition, or, perhaps, at the time of any sales which might have taken place in virtue of it. But the attempted amendment was long subsequent to the judgment and sales. The order allowing and the order vacating the amendment, taken together, neither helped nor harmed either party. The parties were left strictly *in statu quo*. Both orders were made at the same term. During that term they were, in my opinion, like other orders and judgments of the court, subject to its control. If, in the progress of the term, after the amendment had been made, the court became satisfied that the amendment was the result of fraud, misapprehension, or mistake, and was not in furtherance of justice, and that the ends of justice would not be advanced thereby, it would be strange, indeed, if it had no power, with the co-operation and at the instance of the sheriff who obtained the permission to amend, to correct the mistake; leaving the parties in the full enjoyment of all the rights they possessed prior to any action on the subject being taken. No authority is cited which denies the power in question.

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The vacation of the amendment, at the instance of the sheriff, left the matter in precisely the same condition it would have been in had the court held the application for leave to amend under advisement, and then finally denied it. The result is that, in my opinion, the action of the court in undoing what it had done, and in permitting the sheriff to retrace the steps he had mistakenly taken, was lawful and warranted under the circumstances stated.

The judgment, therefore, must be affirmed; the other judges concurring.

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WM. J. ROBINSON, Appellant, v. ISAAC WALKER, Respondent.

1. *Justices' courts—Forcible entry and detainer—Appeal—Transcripts—Must be filed, when, during term of Circuit Court.*—In an action of forcible entry and detainer, where a judgment is rendered before a justice during a term of the Circuit Court, the justice is not obliged to furnish appellant with a transcript unless the affidavit and recognizance are filed with him before the sixth day after the judgment (Gen. Stat. 1865, ch. 188, §§ 11, 12, 23), and the omission to file the transcript within the six days is fatal to the appeal. The appellate court has no jurisdiction of the subject-matter in such case, and the consent of parties can not give it.
2. *Session of court, judicial cognizance of.*—In appeals of this sort it need not appear in proof that the Circuit Court was in session at the date of the judgment before the justice. The Circuit Court could officially know from its own records when it was in session.

*Appeal from St. Louis Circuit Court.*

*Hill & Jewett*, for appellant.

I. The appeal was not taken in time, and is a nullity. (*Bernecker v. Miller*, 37 Mo. 498.)

II. An appellate court can not get jurisdiction by appearance or consent. (*Latham v. Edgerton*, 9 Cow. 227; *Ex parte Shethar*, 4 Cow. 80, 82, 540; *Gibson v. Lynch*, 1 Murphy, N. C., 495.)

III. An appeal allowed by a court below, when court has no authority to allow it, is a nullity, and the original judgment remains in full force. (*Campbell v. Howard*, 5 Mass. 376; *Loveland v. Burton*, 2 Verm. 521; *Eddy's case*, 6 Cush.

28; Clark v. Conn, 1 Munf., Ky., 160; Tatum v. Dayton, 4 Cush. 290.)

*Glover & Shepley, and Gardiner, for respondent.*

I. The record nowhere shows that the Circuit Court was in session at the time the judgment before the justice was rendered.

II. The appeal is not vitiated because the transcript from the justice was not in fact filed in the Circuit Court within six days. Were this not true, then in every case of appeal before a justice of the peace, the justice must prepare the transcript, and must file it within the time limited for taking an appeal. Every applicant's rights would depend upon the amount of business that was before the justice on the day the appeal was allowed, and on his celerity in making out the transcript. The statute prescribes two remedies when the transcript is not filed in time; one for the appellant, at section 34, p. 737; and the other for the appellee, at section 24, p. 736.

III. Any informality in the appeal was waived by the applications, on the part of the appellee, for continuance. (*Lampley v. Beavers*, 25 Ala. 534; *Ayres v. Western R.R.*, 48 Barb. 132; *Dole v. Morely*, 11 How. P. R. 138; *Shaffer v. Trimble*, 2 Iowa, 464.)

BLISS, Judge, delivered the opinion of the court.

The plaintiff obtained a judgment before a justice of the peace in an action of forcible entry and detainer, and defendant appealed, but it is claimed that his proceedings in perfecting the appeal were irregular. After the case had been brought to the Circuit Court, and the parties had appeared, and the case been twice continued at the instance of the plaintiff, he moves the court to dismiss the appeal for the following irregularities in bringing up the case: Judgment was rendered on the 17th day of January, 1867; the affidavit and appeal bond were filed and the appeal granted on the 23d, and the transcript filed in the Circuit Court, then being in session, as is claimed, on the 25th. Sections 11, 12 and 23, of chapter 188, Gen. Stat. 1865, under which this appeal was prosecuted, are as follows: "Sec. 11.

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No appeal shall be allowed in any case unless the same be applied for, and an affidavit and recognizance be filed with the justice, within ten days after the rendition of the judgment and before the return day of the appeal, although such return day be within ten days after the rendition of the judgment. Sec. 12. When the judgment of the justice is rendered during the vacation of the Circuit Court, the appeal shall be returnable to the first day of the next term thereof; but if the judgment be rendered during the term of such court, the appeal shall be returnable within six days after the rendition of the judgment. \* \* \* Sec. 23. The appellant shall cause to be filed in the office of the clerk of the Circuit Court of the county such certified transcript of the record and proceedings before the justice, together with the original affidavit, on or before the return day of the appeal."

The motion states that the Circuit Court was in session when this appeal was granted, and the irregularities complained of are, first, that the affidavit and recognizance were filed with the justice on, and not before, the return day of the appeal; and, second, that the transcript was filed in the Circuit Court on the eighth day after judgment, instead of "within six days."

These irregularities are plain and obvious. The party appealing could take up his transcript on the sixth day from the rendition of the judgment, but the justice was under no obligation to furnish him such transcript for the purposes of the appeal, unless the affidavit and recognizance had been filed with him before said sixth day. If there were any doubt as to the legal effect upon the appeal of this neglect, there certainly can be no doubt in regard to the effect of the omission to file the transcript, and I have never known but one ruling on the subject. A literal compliance with the requirements of the statute in this respect is always held to be essential. It is the only way in which the appellate court can acquire jurisdiction of the subject-matter of the former trial. It is *res adjudicata*, and if reopened it must be according to law, and the law is too plain to admit of construction. The only question that can be raised is the effect of the appearance of the plaintiff in the Circuit Court.

It has often been held that the appearance of a party by joining issue, or by any other action that shall indicate an intention to prosecute or defend the suit upon the merits, shall be deemed a waiver of a defect in the process or notice under which the appearance is had. But in every case of this kind the court had jurisdiction of the subject-matter, and it might with reason be said that a voluntary appearance is well enough. But the Circuit Court has no jurisdiction of a matter already decided on in another court, and especially in actions of forcible entry and detainer exclusively cognizable before a justice of the peace, unless it is brought into court under the statute and according to its provisions; and when it has no such jurisdiction, the consent of the parties can not give it. (James v. Robinson, 1 Mo. 595; Bernecker v. Miller, 37 Mo. 498; Lindsay v. Thompson, 10 Ohio St. 452; Luther v. Edgerton, 9 Cow. 227; *Ex parte* Shethar, 4 Cow. 540; Clark v. Conn, 1 Munf. 160; Gibson v. Lynch, 1 Murphy, 495.)

Appellant below insists that the judgment of the general term should be sustained for the reason that the bill of exceptions does not show that the Circuit Court was in session at the date of the judgment before the justice of the peace, and, if not in session, that the filing of the transcript was in season. But the bill of exceptions only embodies the motion and evidence under it, and the court below could officially know from its own records when it was in session. Having sustained the motion upon the ground named in it, we are bound to believe that it acted with knowledge of this fact, and correctly, unless the contrary be shown. Those who charge error must show it, for we will not assume its existence.

The judgment of the general term, reversing that of the special term, is reversed. The other judges concur.

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Franz v. Hilterbrand et al.

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GEORGE FRANZ, Plaintiff in Error, v. PHILIP HILTERBRAND *et al.*,  
Defendants in Error.

1. *Practice, civil—Trial—Instructions not warranted by evidence, not given.*—It is misdirection and wrong practice to give instructions, no matter how correct they may be abstractly, if the evidence in the particular case does not warrant or justify them.
2. *Damages, exemplary—When given.*—In an action for damages for a trespass, where the act is aggravated, and where there has been fraud, oppression, malice, or gross negligence, the jury is allowed to award exemplary damages, not only to compensate the sufferer, but also to punish the offender. But in the absence of proof showing malice or willfulness, or other circumstances of aggravation, the damages should be compensatory merely.

*Error to Second District Court.*

*S. N. Taylor*, for plaintiff in error.

I. The first and second instructions given for plaintiff were warranted by the evidence, and were proper. (*Goetz v. Ambs*, 27 Mo. 28; *Best et al. v. Allen*, 30 Ill. 30; *Hawk et al. v. Ridgway*, 33 Ill. 473; *Major v. Pullman*, 3 Dana, 582; *Treat v. Barker*, 7 Conn. 274; *Board v. Head*, 3 Dana, 489; *Ingalls v. Bills*, 9 Met. 1; *Duncan v. Stalcup*, 1 Dev. 440.)

II. In actions of trespass and tort, the principles of law sustain the giving of exemplary damages or smart money, and courts will not disturb the verdict of the jury unless the damages are so excessive that at first blush they strike all as being so. (*Huckle v. Mooney*, 2 Wilson, 205; *Major v. Pullman*, *supra*; *Dennison v. Hyde*, 6 Conn. 508; *Goetz v. Ambs*, *supra*; *Somer v. Wilt*, 4 S. & R. 19; *Whipple v. Walpole*, 10 N. H. 130; *Wort v. Jenkins*, 14 Johns. 351)

*Green & Thomas*, for defendants in error.

There was no evidence in the case to warrant instructions to give exemplary damages. (*Milburn v. Beach*, 14 Mo. 104; *Walker v. Borland*, 21 Mo. 289; *Frank v. Dillon*, 21 Mo. 294; *Harrison v. Cachelin*, 27 Mo. 26; *id.* 55; *Sedgw. on Dam.* 527, and authorities there cited; *Kennedy v. North Mo. R.R. Co.*, 36 Mo. 351.)



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WAGNER, Judge, delivered the opinion of the court.

The only question material to notice in this case is the action of the Circuit Court in giving instructions relating to the measure of damages. The plaintiff owned two diseased horses, which he worked on his farm. The defendants, and others residing in the neighborhood, believed the horses had what is known as the glanders, a disease which they apprehended as contagious and incurable; and to prevent its spreading and doing injury, they went to plaintiff's premises and killed the horses. There was no evidence of anything like malice in their action, but they proceeded on the mistaken view that they had the right to enter the plaintiff's premises and abate what they considered a nuisance, and which, if left, might do great harm. They acted from good, but mistaken and unjustifiable, motives. The court instructed the jury for the plaintiff, that if they found from the evidence that defendants killed his horses without his consent or authority, the jury should find for him and assess his damages at the value of the horses, and in addition thereto they might allow such further sum for exemplary damages or smart money as, under all the facts and circumstances in the case, they might deem right, not exceeding the amount claimed in the petition; and that, to entitle the plaintiff to exemplary damages or smart money, it was not necessary to show that defendants had ill-will and hostility towards him, or exercised the same in killing his horses, but if they killed the horses without the authority of the plaintiff, willfully, deliberately, or intentionally, then the idea of punishment was introduced, and exemplary damages or smart money could be awarded. Under this direction of the court, the jury found for the plaintiff, and assessed his damages at three hundred dollars as the value of the horses, and two hundred dollars additional as punitive or vindictive damages. Judgment was entered on the verdict for five hundred dollars, the defendants appealed to the District Court, where a reversal was had, and the plaintiff prosecutes his writ of error. The language of the instruction which is complained of, and which it is claimed misled the jury into giving excessive damages, is copied almost literally from the

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opinion delivered in the case of *Goetz v. Ambs*, 27 Mo. 28. As a proposition of law it is unobjectionable. But it is a misdirection and wrong practice to give instructions, no matter how correct they may be abstractly, if the evidence in the particular case does not warrant or justify them. The theory of the law in regard to damages proceeds upon the principle that compensation for the actual loss sustained is the object sought. Where there are no circumstances of aggravation, the damages should be compensatory only. Where, however, the act is aggravated, and where there has been fraud, oppression, malice, or gross negligence, a different rule is adopted, and the jury is allowed to award exemplary damages, not only to compensate the sufferer, but also to punish the offender. (*Sedgw. on Dam.*, 2d ed., pp. 38, 57; *Milburn v. Beach*, 14 Mo. 104; *Walker v. Borland*, 21 Mo. 289; *Kennedy v. N. M. R.R. Co.*, 36 Mo. 351.) In a case of trespass, in the Supreme Court of the United States, against a marshal for seizing and selling the property of the plaintiff under an execution against another, the rule was laid down with remarkable clearness. The court said: "Where a trespass is committed in a wanton, rude, and aggravated manner, indicating malice or a desire to injure, a jury ought to be liberal in compensating the party injured in all he has lost in property, in expenses for the recovery of his rights, in feeling or reputation; and even this may be exceeded by setting a public example to prevent a repetition of the act. In such cases there is no certain fixed standard; for the jury may not only take into view what is due to the party complaining, but to the public, by inflicting what are called in law, speculative, exemplary, or vindictive damages. But when an individual, acting in pursuance of what he conceives a just claim to property, proceeds by legal process to enforce it, and causes a levy to be made on what is claimed by another, without abusing or perverting its true object, there is, and ought to be, a very different rule if, after a due course of legal investigation, his case is not well founded." (*Conrad v. The Pacific Ins. Co.*, 6 Pet. 268.)

In *Freidenheit v. Edmundson et al.*, 36 Mo. 226, where the defendant, forming a part of a body of armed men, forcibly

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broke open and entered the plaintiff's store, putting him in bodily fear, and took and carried away a large portion of his stock of goods, injuring his business, it was held that the mere value of the goods taken, with interest thereon, was not the proper measure of damages, but that it was a case justifying and calling for vindictive or exemplary damages. In that case exemplary damages were defined to mean such damages as would be a good round compensation, and an adequate recompense for the injury sustained, and such as might serve for a wholesome example to others in like cases. The case of *Goetz v. Ambs*, when rightly understood, is not only not contradictory of the foregoing cases, but is in perfect harmony with them. The learned judge there merely gives the legal acceptance of the words "malice" and "willfulness," and, tested by the criterion he enunciates, the instruction in this case can not be supported. There is an utter and complete absence of malice or willfulness in the legal sense of these terms. There was neither aggravation nor wantonness in the act of the defendants. They committed a trespass, it is true, without legal justification, although they believed they were doing right, and for this they are liable in adequate damages; but to mulct them for almost double the value of the property, is too excessive to be permitted to stand.

The judgment of the District Court will be affirmed. The other judges concur.

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JOHN O'FALLON, JR., Plaintiff in Error, *v.* THOMAS J. KENNERLY *et al.*, Defendants in Error.

1. *Sale—Real estate—Deed of trust—Re-sale.*—At a sale of real estate under a deed of trust, when the highest bidder fails to pay the purchase money, the property may be re-sold by the trustee. (44 Mo. 145; 38 Mo. 469.)
2. *Equity—Sale—Specific performance, when granted—Executory contract.*—Equity may decree a specific performance of a contract for the sale of property, notwithstanding a default in payment upon the day specified, and in many cases where there is an express stipulation of forfeiture. But this relief has always been afforded upon equitable principles, and some circumstances must exist to show that the party is justly entitled to it. There is no

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respectable case, where the contract is wholly executory and the time specific when the purchase money shall be paid, with an express condition of forfeiture if not paid at that time, and where the purchaser has never taken possession or expended anything on the premises, but waits for several years after the payments are due, and until there is a rise in value, in which the purchaser can obtain relief.

3. *Bonds—Conveyance of real estate—Payment—Forfeiture—Waiver.*—Where a bond is given to convey real estate, conditioned on the payment of certain money at a specified time, even though it contains an express stipulation of forfeiture in case of non-payment, yet if part payment be made and accepted after the time fixed, the forfeiture is waived; and upon tender of the balance, the purchaser has a clear equity, but without such tender he has no equity.

*Appeal from St. Louis Circuit Court.*

This was a suit to enforce the specific performance of a bond to convey certain real estate. The facts sufficiently appear in the opinion of the court, and in *Dover v. Kennerly*, 44 Mo. 145, and 38 Mo. 469.

*Thomas, Whittelsey, and Beal*, for plaintiff in error.

In equity, time is not of the essence of the contract; and equity will relieve against a non-compliance with the terms as to time, where it would be inequitable for a party to take advantage of the forfeiture. (*Seaton v. Slade*, 7 Ves. 265, and notes; 2 White & Tud. L. C. Eq. 377, 398; *Langworth v. Taylor*, 14 Pet. 372; 2 Sto. Eq. 776, and notes; *Edgerton v. Peckham*, 11 Paige, 352.) But although time, by agreement of parties, be made essential, yet the condition may be waived by the parties; and if waived, specific performance will be decreed. (*Seaton v. Slade*, *supra*; *Hudson v. Bartram*, 3 Mad. Ch. 440; *Rodiff v. Warrington*, 12 Ves. 326.)

*Fletcher and Green, and Cline, Jamison & Day*, for defendants in error.

A court of equity will not relieve a party against the consequences of a non-compliance with a condition precedent. (*Barrett v. Passumpsic Turnpike Co.*, 15 Verm. 757; *Wells v. Smith*, 2 Edw. Ch. 78; *Chipman v. Thompson*, Walker's Ch. 405; *Spriggs v. Albin*, 6 J. J. Marsh. 158; *Bucks v. Jouitt's Adm'r*,

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broke open and entered the plaintiff's store, putting him in bodily fear, and took and carried away a large portion of his stock of goods, injuring his business, it was held that the mere value of the goods taken, with interest thereon, was not the proper measure of damages, but that it was a case justifying and calling for vindictive or exemplary damages. In that case exemplary damages were defined to mean such damages as would be a good round compensation, and an adequate recompense for the injury sustained, and such as might serve for a wholesome example to others in like cases. The case of *Goetz v. Ambs*, when rightly understood, is not only not contradictory of the foregoing cases, but is in perfect harmony with them. The learned judge there merely gives the legal acceptation of the words "malice" and "willfulness," and, tested by the criterion he enunciates, the instruction in this case can not be supported. There is an utter and complete absence of malice or willfulness in the legal sense of these terms. There was neither aggravation nor wantonness in the act of the defendants. They committed a trespass, it is true, without legal justification, although they believed they were doing right, and for this they are liable in adequate damages; but to mulct them for almost double the value of the property, is too excessive to be permitted to stand.

The judgment of the District Court will be affirmed. The other judges concur.

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JOHN O'FALLON, JR., Plaintiff in Error, v. THOMAS J. KENNERLY *et al.*, Defendants in Error.

1. *Sale—Real estate—Deed of trust—Re-sale.*—At a sale of real estate under a deed of trust, when the highest bidder fails to pay the purchase money, the property may be re-sold by the trustee. (44 Mo. 145; 38 Mo. 469.)
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respectable case, where the contract is wholly executory and the time specific when the purchase money shall be paid, with an express condition of forfeiture if not paid at that time, and where the purchaser has never taken possession or expended anything on the premises, but waits for several years after the payments are due, and until there is a rise in value, in which the purchaser can obtain relief.

3. *Bonds—Conveyance of real estate—Payment—Forfeiture—Waiver.*—Where a bond is given to convey real estate, conditioned on the payment of certain money at a specified time, even though it contains an express stipulation of forfeiture in case of non-payment, yet if part payment be made and accepted after the time fixed, the forfeiture is waived; and upon tender of the balance, the purchaser has a clear equity, but without such tender he has no equity.

*Appeal from St. Louis Circuit Court.*

This was a suit to enforce the specific performance of a bond to convey certain real estate. The facts sufficiently appear in the opinion of the court, and in *Dover v. Kennerly*, 44 Mo. 145, and 38 Mo. 469.

*Thomas, Whittelsey, and Beal*, for plaintiff in error.

In equity, time is not of the essence of the contract; and equity will relieve against a non-compliance with the terms as to time, where it would be inequitable for a party to take advantage of the forfeiture. (*Seaton v. Slade*, 7 Ves. 265, and notes; 2 White & Tud. L. C. Eq. 377, 398; *Langworth v. Taylor*, 14 Pet. 372; 2 Sto. Eq. 776, and notes; *Edgerton v. Peckham*, 11 Paige, 352.) But although time, by agreement of parties, be made essential, yet the condition may be waived by the parties; and if waived, specific performance will be decreed. (*Seaton v. Slade*, *supra*; *Hudson v. Bartram*, 3 Mad. Ch. 440; *Rodiff v. Warrington*, 12 Ves. 326.)

*Fletcher and Green, and Cline, Jamison & Day*, for defendants in error.

A court of equity will not relieve a party against the consequences of a non-compliance with a condition precedent. (*Barrett v. Passumpsic Turnpike Co.*, 15 Verm. 757; *Wells v. Smith*, 2 Edw. Ch. 78; *Chipman v. Thompson*, Walker's Ch. 405; *Spriggs v. Albin*, 6 J. J. Marsh. 158; *Bucks v. Jouitt's Adm'r*,



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3 Litt. 229.) Time is as fully expressed as the essence of the contract, in this case, as the nature and circumstances of the contract required that it should be. (2 Sto. Eq. Jurisp. § 776; 1 Sugd. on Vendors, 339.)

BLISS, Judge, delivered the opinion of the court.

One J. B. Dover was indebted to the plaintiff in six promissory notes for \$383.33 each, dated February 2, 1858, due, with interest, in from one to six years respectively, which notes were secured by deed of trust upon the property in controversy. Dover paid the first two notes, and the plaintiff sold to defendants the third and fourth. The notes thus sold to defendants not being paid, they directed the trustee to offer the property for sale, and the plaintiff bid it off, but was unable to pay his bid, whereupon it was again offered, and bid in by the defendants for \$530, which sum was applied in payment in full of one of the notes, and a small balance upon the other. Soon after this sale, upon complaint of loss by the plaintiff, the defendants told him that all they wanted was the money advanced for the notes they purchased, with interest, etc., and offered, if he would repay the same, to sell him the property; and accordingly, on the 6th of May, 1861, they executed to the plaintiff's trustee a bond to convey him the property and deliver up the fourth note of Dover, which he had sold them, upon condition that he should pay them \$507 on the 12th of June thereafter, and \$408.24 on the 2d of February, 1862. This bond was given to John O'Fallon, for the use of the plaintiff, and assigned to him before suit by the heirs of the obligee. The \$507 represented Dover's third note, with interest, and costs and expenses, and the \$408.24 represented the fourth note. There was no express obligation on the part of the obligee of the bond, or of any one else, to pay these sums; but the bond contained a stringent claim of forfeiture if they were not paid. Neither of these payments were made, although the plaintiff claims that in June, 1862, the second amount was included in a transaction between the defendants and Sophia O'Fallon, for the use of Charles O'Fallon, and paid July 1, 1863. There is much obscurity in the testimony as preserved in relation to this

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transaction, and its character does not clearly appear. If the defendants actually received a payment upon the bond long after it was due, it would play a very important part in the claim of the plaintiff by preserving the vitality of the instrument. Whatever the provisions of the bond in regard to forfeiture for want of punctuality, it is clear that if the obligor, after default, actually received a payment upon it, the forfeiture was waived and the time extended.

The petition in this case is mixed, and it is quite uncertain whether the plaintiff relies upon his general equities as holder of the fifth and sixth notes given him by Dover, secured by the trust deed and still unpaid, or whether upon his rights as beneficiary of the bond. If the sale by the trustee is to be held valid, the property became vested in the defendants, relieved of all the plaintiff's equities, and he must rely alone upon the bond. The validity of that sale can be no longer questioned, as it has been twice sustained by this court—once in *Dover v. Kennerly et al.*, 38 Mo. 469, and again in the same case, decided at the October term, 1868, 44 Mo. 145—and we can only consider the rights of the plaintiff under the bond. The plaintiff alleges that it was given in pursuance of a verbal agreement made before the sale, that the Kennerlys alone should bid, and should then give him further time, or rather the benefit of the bid. Without giving any opinion upon the legal effect of such agreement, it can not be regarded as proved, inasmuch as it depends alone upon the oath of the plaintiff, who is expressly contradicted by the testimony of the defendants, whose testimony is indirectly confirmed by that of Dover, who was introduced by the plaintiff.

There is no doubt that equity may decree a specific performance of a contract for sale of property, notwithstanding a default in payment upon the day specified. The books are full of instances where such relief has been granted, and in many cases where there is an express stipulation of forfeiture. But this relief has always been afforded upon equitable principles. It will by no means be given as a matter of course, but some circumstances must exist to show that the party is justly entitled to it; as, for instance, where the purchaser has gone into possession

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and made valuable improvements or paid a considerable portion of the purchase money, or the default is occasioned by the act of the vendor, or he has waived it by receiving part of the purchase money, or otherwise, or where any other circumstances exist that would render a forfeiture inequitable. But I have never seen a respectable case, where the contract is wholly executory and the time specific when the purchase money shall be paid, with an express condition of forfeiture if not paid at the time, and where the purchaser has never taken possession or expended anything upon the premises, but waits for several years after the payments are due, and until there is a rise in value, in which he has obtained this relief.

The whole equity of this case, so far as it seeks specific performance, depends upon the truth of the plaintiff's claim that the second payment was made by him, or on his behalf, after the whole was due, and accepted as such by the defendants. If that claim be true, the forfeiture is waived, and, upon tender of the balance, the plaintiff has a clear equity; but upon this point the evidence is far from clear. The plaintiff testifies that he paid to defendants the consideration of a certain bond for the sale of other land, given by them to Mrs. Sophia O'Fallon, amounting to about \$2,700, which sum included the second payment conditioned in defendants' bond to him. He fails to explain how he came to pay this second bond; how this payment in his own bond came to be embraced in it; why he made his second payment first, or what interest he had in the latter bond. But the testimony of Wm. C. O'Fallon and the copy of the bond may throw a little light upon it. From that testimony it appears that the bond to Sophia O'Fallon was given for the benefit of Charles O'Fallon, who was an indorser of the Dover notes sold defendants, and was liable upon them; so that when the defendants gave Sophia O'Fallon this bond for the use of Charles O'Fallon, the latter was owing them the amount of the fourth Dover note, less the small indorsement, which would be a good reason for including it in consideration of the bond. This bond was executed some months after all the payments were due on the one given to plaintiff, and its consideration was to be paid over a year

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after its execution. It is not shown that it had any connection whatever with the first bond; but the fact that it included this Dover note is not only perfectly consistent with, but rather suggests, the idea that the plaintiff was unable to, or had concluded not to, pay up the consideration of the first bond, and that the defendants looked to Charles O'Fallon for the payment of so much of their Dover notes as were not paid by their bid for the land. It is very likely that this last bond was paid by or through the plaintiff, as he says; for the copy in the bill of exceptions contains an assignment from Sophia O'Fallon to his trustee, and he perhaps purchased the land embraced in it, and paid the price agreed upon. If this were so, no part of this payment could be applied upon the first bond without the consent of the obligors, for each sale was independent, for distinct parcels of land; and, in the meagerness of the evidence, the only explanation of the transaction I can make is that plaintiff abandoned his purchase evidenced by the first bond, and afterwards concluded to buy the land sold to Sophia O'Fallon; or that her assignment to his trustee was a sham, designed to enable him to avail himself of her payment of that part of the fourth Dover note embraced in the consideration of defendants' bond to her. It should be remarked that defendants deny that any payment whatever has been made on their bond to plaintiff's trustee, upon which this suit is brought.

But there is another fatal objection to the plaintiff's equity. No tender of the amount due upon the bond has been made. The plaintiff swears that he was ready to pay and offered to pay, but admits, on cross-examination, that he has never tendered the money, and gives no sufficient excuse for not doing so, while the defendants swear that he has never offered them anything. If time is not of essence, payment certainly is, and the purchaser can have no equity without offering to pay the purchase money.

The judgment of the Circuit Court was for the defendants, which was properly affirmed by the District Court. The other judges concur.

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McLaren v. Sheble.

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CHAS. McLAREN, Respondent, v. EDWIN A. SHEBLE, Appellant.

1. *Revenue—Real estate sold subsequent to first Monday in September—Taxes on, paid by whom—Lien of tax.*—State and county taxes constitute a lien on real estate from and after the first Monday in September, and the then owner will be liable to a subsequent purchaser for them, on his covenant of warranty, even though the sale is prior to the assessment. (*Blossom v. Van Court*, 34 Mo. 390; Gen. Stat. 1865, ch. 12, § 12.)

*Appeal from St. Louis Circuit Court.*

*Harding & Crane*, for appellant.

The present revenue law (Gen. Stat. 1865, ch. 12, p. 98 *et seq.*) does not provide or contemplate that the assessments to be made thereunder shall operate as liens by relation, but only from the time when they shall actually be made. (Gen. Stat. 1865, ch. 12, §§ 9, 10, 13, pp. 99, 100; *id.* § 67, p. 108; *Long v. Moler*, 5 Ohio St. 272; *Hutchins v. Moody*, 30 Verm. 657; *Jackson v. Sassaman*, 29 Penn. St. 109.) The case of *Blossom v. Van Court*, 34 Mo. 390, is not applicable to the present statute. Under the former law, the assessment, as well as all subsequent acts, took place in the year for which the taxes were levied, while under the latter the assessments may commence on the first Monday of September of the year preceding.

*Krum, Decker & Krum*, for respondent.

The lien by statute for taxes is an outstanding encumbrance created by statute on the first Monday of September previous to the date of the deed. (*Blossom v. Van Court*, 34 Mo. 390; *Long v. Moler*, 5 Ohio St. 271; *Rawle on Cov.* 149; *Mitchell v. Pillsbury*, 5 Wis. 407; 3 Washb. on Real Prop. 393.) The fact that the encumbrance is created by law, or is known, makes no difference. (Same cases, 3 Washb. Real Prop. 394.)

CURRIER, Judge, delivered the opinion of the court.

On the first Monday of September, 1866, the defendant was the owner and in possession of certain real estate in St. Louis

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county, and so continued till October, when he sold and conveyed the same to the plaintiff, who thereupon took possession. The deed of conveyance contained the covenant of warranty implied in the words "grant, bargain, and sell." This suit is brought upon that covenant to recover the amount of State and county taxes assessed against the property in the name of the defendant for the fiscal year 1866-7, the same having been paid by the plaintiff, the defendant refusing to do so.

No actual assessment of the property for the year 1866 had been made at the date of the sale and transfer. The assessment, however, was subsequently made in accordance with the statute in the name of the defendant, as being the owner on the first Monday of September of that year. Did the lien of the tax imposed by virtue of the assessment take effect by relation from that date? That is the only question presented for consideration, and it is substantially determined by the decision in *Blossom v. Van Court*, 34 Mo. 390. The circumstantial differences between the two cases do not affect the principle involved. That case decides in effect that the tax lien does relate back to and take effect from the inception point of the assessment, although the assessment may not be consummated till a later day or month in the year. The language of the court on this point is clear and explicit. The statute under which that decision was made required the assessor to begin his work on the first day of February; the present statute requires the assessment to date from the first Monday of September, and to include the taxable property of the tax-payers respectively owned by them on that day. The oath required to be administered to tax-payers (Gen. Stat. 1865, ch. 12, § 12) excludes all doubt as to the true initial point of the assessment.

According to the rule laid down in *Blossom v. Van Court*, the defendant, being the owner and occupier of the premises on the first Monday of September, 1866, was liable for the taxes of the fiscal year beginning at that date, and such taxes constituted a lien upon the property, by relation, from and after the first Monday of September, although not actually levied till the year 1867. The rule is just. Suppose that A., on the first Monday of Sep-



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tember in any given year, had \$10,000 cash, and returned it as the law requires; and B., on the same day, had \$10,000 invested in real estate, and in like manner returned it for taxation. Suppose, then, that these parties, on some subsequent day prior to the consummation of the assessment, should exchange property, who should pay the taxes? A. would be compelled to pay the personal taxes assessed on account of the \$10,000 cash returned, and, according to the theory of the defendant, also the taxes assessed on account of the real estate returned by B.—thus paying the taxes of the two for that year, relieving his vendor from all tax payments whatever, in the case supposed. The true and equitable rule is for each party to pay the taxes assessed on account of the property owned by them respectively on the initial day of the assessment, in the absence of any stipulation to the contrary.

This equitable rule is recognized in *Blossom v. Van Court*, and that case, as already observed, decides that the tax lien takes effect and becomes an encumbrance from the inception of the assessment. An adoption of the principle of that decision involves an affirmance of the judgment. Judge Bliss concurs. Judge Wagner absent.

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ADAM DEICKHART, Trustee, etc., Appellant, v. ANTOINETTE  
RUTGERS, Respondent.

1. *Practice, civil—Decree, interlocutory—Power of court to set aside.*—Suit was brought to set aside the forfeiture of certain leases, and for an account of the rents, profits, etc. The court issued a decree entitling plaintiff to redeem the premises on payment to defendant of an amount to be ascertained by a referee, and ordered an account to be taken for that purpose. *Held*, that the decree was not final, but interlocutory, and subject to the control of the court so long as the case properly remained upon its docket awaiting final action, and that it had power, at a subsequent term, to make an order vacating the decree; and, further, that affidavits showing the decree to have been issued without notice, trial, or consent, made a case calling for the exercise of that power.

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*Appeal from St. Louis Circuit Court.*

*Beal & Moody*, and *Krum, Decker & Krum*, for appellant.

I. A decree is final where it decides and disposes of the whole merits of the points in issue, although it directs a reference. (1 Barb. Ch. 330; 2 Daniels' Ch. 1001, 1010; 1 Cow. 691.)

II. A judgment, if erroneous, may be set aside during the term; but after the term no alteration of the judgment is allowable, except such as is authorized by statute of jeofails and amendments. (4 Mo. 228, 315; 7 Mo. 320.)

III. Where the record shows that the parties appeared by attorneys, it is never allowable to contradict the record by affidavit that the parties did not appear. (*Weber v. Schmeisser*, 7 Mo. 600, 601; 4 Mo. 228; *Ramsey v. Goodfellow*, 7 Mo. 594; *Latrielle v. Dorlique*, 35 Mo. 237.)

*Glover & Shepley*, for respondent.

I. The order made January 29, 1867, was an interlocutory order. (*Seaton's Forms*, 2; *Jacques v. M. E. Church*, 17 Iowa, 548; *Cooke v. Gilpin*, 1 Rob., Va., 20; *Dunbar v. Woodcock*, 10 Leigh, 628; *Mackey v. Bell*, 2 Munf. 523.) A decree which appoints a commissioner and requires him to report is not a final decree. (*Garrard v. Webb*, 4 Porter, 73.) A decree that leaves anything to be done to render it certain and effectual is interlocutory. (*Hays v. Mays*, 1 J. J. Marsh. 497; *Travis v. Waters*, 1 Johns. Ch. 87; *Johnson v. Everett*, 9 Paige, 636; *Price v. Nesbitt*, 1 Hill, Ch. 445.)

II. The court has power over the interlocutory order as long as it has any power over the cause. (*Hays v. Mays*, *supra*.) "An interlocutory order is always under the control of the court rendering it." (*Thompson v. Peebles*, 6 Dana, 387; *Ogle v. Lee*, 2 Cranch, 33; *Ashley v. Glasgow*, 7 Mo. 320; *Doss v. Tyack*, 14 How. 297.)

CURRIER, Judge, delivered the opinion of the court.

The plaintiff filed his petition in equity for the purpose of having the forfeiture of certain leases therein described set aside,

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and for an account of rents and profits, etc. The answer put in issue the equity of the petition.

On the 29th day of January, 1867, the court made a decree as follows: "Now, at this day, come the parties by their attorneys; and the court, having heard the proofs and arguments of the counsel, doth find that the plaintiff is entitled to redeem said premises from said forfeitures on payment to the defendant, or into court for their use, the amount to be ascertained by an account to be taken; and it is ordered that this cause be referred to R. E. Rombauer, Esq., to take and state an account between the parties hereto, and to report to this court the balance of account which may be found to be due to either party, for the further action of this court."

Subsequently another referee was appointed, who heard the cause, and whose report was affirmed February 6, 1868. On the 21st of March of the same year, the defendant moved the court to "set aside the interlocutory judgment, as appearing to be entered of record on the 29th day of January, 1867, because the same was irregular, no trial having ever been had or evidence presented in said cause since the reversal of the same on the 25th day of January, 1867, nor any agreement on the part of the defendant or her counsel for any such judgment, or notice or knowledge of any such judgment having been rendered." Affidavits were filed in support of the motion, as also in opposition to it. On the 28th of the same month the motion was considered and sustained, and the decree of January 29, 1867, ordered to be set aside and held for naught.

October 5, 1868, the plaintiff filed a motion to set aside this vacating order, and for judgment on the referee's report. January 26, 1869, the motion was considered and sustained, and judgment for the plaintiff rendered upon the report for \$1,574.07; the court holding as "matter of law that the order of the court made on the 29th day of January, 1867, was binding and conclusive in the case, and for that reason was erroneously set aside, and for the reason above that said decree or order was so deemed conclusive as against the defendant." The court acted solely on the record, no extraneous proof being submitted on either side.

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This action of the court was duly excepted to and the cause appealed to the general term, where the judgment of the court at special term was reversed and the cause remanded. The plaintiff thereupon appealed to this court, and brings the case here for review.

No question arises upon this record affecting the merits of the cause as presented by the pleadings. The defendant insists that she has had no hearing or trial upon the main issue in the case; that the order or decree of January 29, 1867, was made without notice, trial, or consent. For that reason the decree was set aside at a subsequent term of the court; in fact, after several terms had intervened. The main question now presented is, had the court, in March, 1868, power to vacate and annul the decree made January 29, 1867? That depends upon whether the decree is to be considered and treated as final in its character and effect, or as only interlocutory. If it was interlocutory merely, it was under the control of the court so long as the case properly remains upon its docket. But if it was final, then the court had no control over it (except for irregularities) beyond the term at which it was rendered.

In considering this subject, it may be remarked that obviously there could be but one "final" decree in the case. It is equally apparent that the decree under consideration did not make a final disposition of the case. A reference was ordered for the purpose of ascertaining facts preliminary to a decree which should finally dispose of the suit and conclusively settle rights of the parties. These facts were to be reported as a basis of further action on the part of the court, and the decree so declares. But a decree is not final unless it decides and disposes of the whole merits of the litigation, and reserves no further questions or directions for the future judgment of the court, and so that it will be unnecessary to bring up the case again for the final decision of the court. (2 Daniels' Ch. 1010, note 1, and the cases there cited.) It is said, however, that a decree may be final although it directs a reference, provided all the consequential directions depending upon the results of the report are contained in the decree, so that no further decree will be necessary, upon the

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confirmation of the report, in order to give the parties the entire and full benefit of the prior decision. (*Mills v. Hoag*, 7 Paige, 18.) But that is manifestly not this case. Here there was to be further action on the coming in of report, and not till then were the rights of the parties to be finally and definitely fixed and adjudicated.

The decree, then, was not final; and not being final, it was only interlocutory (*Seaton's Forms*, 2), and an interlocutory decree is always under the control of the court rendering it. (*Hays v. Mays*, 1 J. J. Marsh. 497.) A court may at any time reverse an interlocutory decree. (*Ogle v. Lee*, 2 Cranch, 33.)

In *Mackay v. Bell*, 2 Munf. 523, it was held that a decree, though deciding the right to the property in controversy, and awarding the costs of suit, was nevertheless only interlocutory, if commissioners were appointed to carry it into effect, and the court had still to act upon their report.

In *Thompson v. Peebles*, 6 Dana, 391, the court made a decree directing the defendant to convey, on or prior to the first day of the next term, the deed to be acknowledged and produced in court at the final hearing, the question of costs and other matters being reserved until that time; and it was held that this was not a final decree settling the rights of the parties, but interlocutory only, subject to being set aside at any subsequent term of the court. The decree in that case was set aside some four years after its original entry. (See *Jacques v. M. E. Church*, 17 Johns. Ch. 548.)

Our conclusion is that the decree of January 29, 1867, was not final, but interlocutory merely, and that it was consequently subject to the control of the court so long as the case properly remained upon its docket awaiting final action. The vacating order of March 28, 1868, therefore was warranted so far as it involved a question of power; and the evidence made a case calling for the exercise of that power.

From this it follows that the order and judgment, subsequently entered on the 26th day of January, 1869, were erroneous, being based upon the mistaken assumption that the decree of January 29, 1867, was conclusive, and beyond the control of the court to

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vacate or amend after the lapse of the term during which it was made. This decree had been vacated and set aside. It was of no force, and should have been disregarded; but it was treated as a valid subsisting decree, and governed the action of the court. This was error.

Some other points have been discussed, but it is not deemed necessary to advert to them. The views already presented determine the disposition to be made of the case.

The judgment of the court at general term must be affirmed. Judge Bliss concurs. Judge Wagner absent.

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HENRIETTA MEYER, Respondent, v. THE PACIFIC RAILROAD COMPANY, Appellant.

1. *Practice, civil—Trial—Instructions—Evidence.*—In trials at law, the Supreme Court will not weigh conflicting evidence.
2. *Practice, civil—Trial—Instructions—Singling out specific acts, etc., not permissible.*—The practice of singling out in instructions specific acts, and asking the court to say, as a matter of law, that if these acts were established there could be no recovery, is not permissible.

*Appeal from St. Louis Circuit Court.*

*Woerner & Kehr*, for respondent.

*Van Wagoner and Dickson*, for appellant.

WAGNER, Judge, delivered the opinion of the court.

When this case was before this court on a previous occasion the judgment was reversed because the Circuit Court, upon the trial, undertook to single out a certain fact, and instruct the jury that it amounted to negligence, without regard to other facts and circumstances. (See *Meyer v. Pacific R.R. Co.*, 40 Mo. 151)

Upon a re-trial the whole question of negligence on the part of the employees of the defendant, and contributory negligence on the part of the deceased, was submitted to the jury. The evidence was conflicting, but it is not for this court to say that the jury erred. It was for them to compare and judge of its



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weight. The instructions given at the instance of both parties, when taken together, constitute a full, complete, and just presentation of the law.

It is insisted, however, that the court erred in refusing certain instructions asked for by the defendant. But in this view we do not concur. The instructions previously given fully covered the whole case, and there was no necessity for additional ones. Besides, the instructions refused, except what was comprehended in the previous ones, were wrong in themselves. They singled out certain specific acts, and asked the court to say, as matter of law, that if these acts were established there could be no recovery. This court has so often held that such a course of practice is not permissible, that it is unnecessary to further pursue the subject.

Judgment affirmed. The other judges concur.

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THE CITY OF ST. LOUIS, TO THE USE OF DEPPELHEUER *et al.*,  
Appellant, v. LINA NEWMAN *et al.*, Respondents.

1. *Limitations—Special tax bills, statute applies to.*—A special tax bill issued more than five years prior to commencement of suit for its collection, is barred by the statute of limitations. (Gen. Stat. 1865, ch. 191, § 10.) In such suit the city is the substantial plaintiff; and as that section in terms applies to demands in favor of the State, by implication it also applies to demands of a city corporation created by the State, in the absence of any provision to the contrary.

*Appeal from St. Louis Circuit Court.*

*Woerner & Kerr*, for appellant.

*Bakewell & Farish*, for respondents.

CURRIER, Judge, delivered the opinion of the court.

This suit is brought to recover a special tax assessed against property of the defendants, on account of certain street improvements. The tax bill was issued more than five years prior to the commencement of the suit, and the statute of limitations is relied on as a defense. The suit is not founded upon a contract, but

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upon a liability created by statute. The action is brought to recover a special tax assessed under authority of law. (City of St. Louis, etc., v. Hardy, 35 Mo. 265.) It is personal as well as *in rem*, and the city is the substantial plaintiff. (St. Louis, etc., v. Clemens, 36 Mo. 472-3.) Is it "an action upon a liability created by statute" in such sense as to bring it within the scope of the statute of limitations? (R. C. 1855, p. 1048, § 3, being the same as Gen. Stat. 1865, p. 747, § 10.) That is the only point presented for consideration.

The liability sued on was unquestionably "created by statute," and so comes within the words of the limitation enactment. But it is urged that time does not run against the government. Whether this argument applies to the facts of the case under consideration it is not necessary to inquire. It is answered by the act of limitations itself, which provides that limitations "shall apply to actions brought in the name of the State, or for its benefit, in the same manner as to actions by private parties." (Gen. Stat. 1865, p. 749, § 33.) If the act applies to demands in favor of the State, as it clearly does, then it must apply to demands of a city corporation created by the State, in the absence of any special provision to the contrary. No question can here arise as to the constitutionality of the provision last referred to, since it was in force for considerably over two years prior to the institution of this suit. (See *Stephens v. St. Louis National Bank*, 43 Mo. 385.)

With the concurrence of the other judges, the judgment will be affirmed.

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CHAS. CONNOYER *et al.*, Appellants, v. THEODORE LABEAUME'S  
HEIRS, Respondents.

1. *Lands and land titles — Confirmation — Assignment — Act of July 4, 1836.* — The board of commissioners, under the act of Congress of July 4, 1836, confirmed a certain lot "to A. or his legal representatives." *Held*, that the party claiming must do so, if not in his own name, at least in his own person, and produce evidence of his title as such legal representative. This being done, the title will inure to his own benefit; and it is not necessary that the confirmation should be made to him by name. (*Connoyer et al. v. Washington University*, 36 Mo. 481.)

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*Appeal from St. Louis Circuit Court.*

For statement of the case, see *Connoyer et al. v. Washington University*, 36 Mo. 481.

*Whittelsey* and *Cunningham*, for appellants, cited *Hogan v. Page*, 2 Wall., U. S., 605; *Allen v. Moss*, 27 Mo. 354; *Allen v. King et al.*, 35 Mo. 216; *Hogan v. Page*, 22 Mo. 55; *Mercier v. Letcher*, 22 Mo. 66.

*Glover & Shepley*, and *E. W. Pattison*, for respondents, cited *Bissell v. Penrose*, 8 How. 317. Here Rudolph Tillier presented the claim before the first board, and exhibited before the board as evidence of his title an unacknowledged deed from Benito Vasquez to him. The court says that there was no claim on the part of Vasquez, but the claim was by Tillier, both by producing concession, and with it the written evidence of his claim, as required by the act, and decide that the title was confirmed to Tillier, the assignee, as claimant, under the act of 1836. (*Boon v. Moore*, 14 Mo. 120; *Connoyer v. Washington University*, 36 Mo. 481; *Hogan v. Page*, 2 Wall. 605; 22 Mo. 55; 32 Mo. 68.)

CURRIER, Judge, delivered the opinion of the court.

This is an ejectment suit brought to recover possession of a portion of a common-field lot in the St. Louis prairie, confirmed to widow Dodier or her legal representatives, under the act of Congress of July 4, 1836. The main point in the case is the same as that presented in the suit in favor of the same plaintiffs against the Washington University, reported in 36 Mo. 481; that suit embracing another portion of the same common-field lot.

In *Connoyer v. Washington University*, the judge delivering the opinion of the court seems to recognize, without abatement, the principle announced in *Bissell v. Penrose*, 8 How. 317, as illustrated and applied in *Boon v. Moore*, 14 Mo. 420, but proceeds to say: "The cases of *Bissell v. Penrose*, and *Boon v. Moore* would require that they (the representatives of widow Dodier) should have made the claim for themselves, if not in

their own names, at least in their own persons, and produced the evidence of their title as such legal representatives of the widow Dodier. This does not appear to have been done here." Therefore, as it would seem for the reason that the things named did not appear by that record to have been done, the court reversed the judgment of the lower court.

The facts mentioned as not shown by the record in the University case, are supplied in the case at bar. It is not questioned that Louis LaBeaume, in 1811, as assignee of Margaret Bequette, widow of Dodier, and others, heirs of Francois M. Millet, upon legal notice, filed with the old board of commissioners the claim in question, together with the original concession to said Dodier, and a deed of transfer from the parties named as assignors to himself. It now further appears that he also at the same time filed with the board a deed from Joseph Hortiz, which assumes to convey to LaBeaume all the grantor's interest in the premises acquired by him at a public sale of the effects of Veuve Dodier. This deed is dated June 27, 1808. In the University case the court speaks of this deed as not appearing to have been filed with the land commissioners at all. It is now shown to have constituted a part of the evidence filed with the commissioners in support of LaBeaume's derivative title.

It further appears by the present record that after the decease of Louis LaBeaume, the original assignee claimant, his representative, Louis A. LaBeaume, appeared before the commissioners in 1835, and prosecuted the same claim in behalf of his mother, who was the devisee of LaBeaume, deceased. But the plaintiffs insist that although Louis LaBeaume, in his lifetime, in his own name and behalf as assignee, filed the claim with the land commissioner, claiming it as his own, and although he furnished the described evidence of his derivative title in support of the claim, and notwithstanding the fact that his legal representatives personally took up and prosecuted the claim to final judgment, still, inasmuch as the confirmation was not to LaBeaume by name, the title vested in and inured to the benefit of whoever might be able by legal proofs to show themselves to be the legal representatives in fact of said widow Dodier, as heirs, devisees,

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or assignees. In a word, the plaintiffs are not satisfied with the principle announced in *Bissell v. Penrose*, and *Boon v. Moore*, and seek a construction of it that shall abate its force. Indeed, the principle contended for by the plaintiffs is deemed to be in direct antagonism to those decisions. If it prevails, it would amount to a substantial overruling of them. It would take from them all practical force and meaning. In *Carpenter v. Rannels*, (see this vol., page 584,) the same point arose. It is there more fully considered. The decision in that case determines the disposition of this. The judgment must therefore be affirmed. The other judges concur.

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THE MERCHANTS' AND MANUFACTURERS' INSURANCE COMPANY,  
Respondent, *v.* PETER CURRAN, Appellant.

1. *Insurance.*—The rules of an insurance company provided that certain kinds of property might be insured, "if approved, at special rates," and that such special risks should be approved by an executive committee of three directors before a policy on the property should be issued. The by-laws of the company vested in the president a general supervision of its affairs. Property of the kind specified was insured at special rates, and the policy issued thereon was signed by the president and secretary, as required by the by-laws, but without the action of the executive committee. *Held*, that the policy being issued by the duly authorized agents of the company, and upon a full knowledge of all the facts material to the risk, the company was liable on the policy, notwithstanding the non-action of the committee. The action of the committee was preliminary, and in this case must be held to have been waived.
2. *New trial—Newly-discovered evidence.*—The granting of a new trial on the ground of newly-discovered evidence is a matter resting in the sound discretion of the judge trying the case.

*Appeal from St. Louis Circuit Court.*

*Moore & Griffin*, for appellant.

The secretary had no power in the matter until after approval by the committee. (*Plahto v. Merch. & Man. Ins. Co.*, 38 Mo. 255; *Mound City Mut. Ins. Co. v. Curran*, 42 Mo. 374; *Ang. & Ames on Corp.* 291; 11 C. & B. 926-7; 2 Cranch, 127; 5

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McLean, 194; 31 Eng. Law & Eq. 57; 4 Wheat. 636; 4 Pet. 152; 9 How. 172.) In case of special hazard, the majority of the directors, the president and secretary, had no right to issue a policy until the committee of three had examined and approved, in accordance with by-laws. (13 Pet. 519; 14 Pet. 122; 1 Sumner, 46; 1 Blackst. C. C. 425.)

*W. H. Horner*, for respondent.

I. The directors are the managing agents of the company, and their action is, *prima facie*, binding upon the members.

II. Even if the by-laws provide that certain property shall not be insured, and the officers of the company issue a policy insuring such property, with knowledge of the facts, the company will be held to have waived the by-law, and neither party to the contract can interpose the by-law as a defense. By-laws are passed for the convenience of the company. They are not restrictive of its power. (U. M. Ins. Co. v. Keyser, 32 N. H. 313; Campbell v. M. & F. Ins. Co., 37 N. H. 35; 12 Iowa, 134; 5 Denio, 156; Ang. on Ins. § 242.)

III. In the absence of fraudulent concealment of facts, the issuing of the policy is conclusive upon the plaintiff. The doctrine of estoppel *in pais* clearly applies. (Combs v. Hannibal Ins. Co., 43 Mo. 151; Franklin v. Atlantic Ins. Co., 42 Mo. 460, 462; Horwitz v. Equitable Ins. Co., 40 Mo. 557; Rowley v. Empire Ins. Co., 36 N. Y. 550.)

CURRIER, Judge, delivered the opinion of the court.

This suit is brought to recover two assessments upon the defendant's premium note, payable to the plaintiffs. The note was given in consideration of a policy of insurance issued to the defendant by the plaintiffs, insuring certain property therein described.

The answer admits the execution and delivery of the note and policy, and also the levying of the assessments, the latter facts not being specifically denied. The defense rests upon the affirmative ground that the note was given without consideration, the



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policy being the only inducement to it, and that being, as is alleged, void and of no effect, constituted no consideration for the note. It is alleged that the policy was issued in violation of the company's by-laws, and for that reason it is supposed to be void and not to bind the plaintiffs.

The plaintiffs' charter authorized the insurance of "property of all kinds," and provided that the "business of the company should be conducted under such rules and regulations as might from time to time be adopted by the directors." One of these rules provided that "steam-mills, and other establishments where fire, heat, and steam" were employed, might be insured, "if approved, at special rates;" another rule provided that these special risks should be approved by an executive committee of three directors before a policy thereon should be issued. An alleged violation of this rule is supposed to vitiate the policy.

The property insured in the policy was used for distilling purposes, and "fire, heat, and steam power" were employed in operating the establishment, all of which was known to the plaintiffs at the time the policy was issued, and a special rate was charged accordingly. The policy was signed by the president and secretary and verified by the company's seal. What agency the executive committee had in issuing it does not distinctly appear. The pleadings made no issue on that specific subject; and the court, at the trial, gave and refused instructions upon the theory that the supposed non-action of this committee was immaterial to the validity of the policy. It is this action of the court that is complained of, and that is urged as the main reason for reversing the judgment.

The point is not well taken. The policy was signed by the president and secretary, as the by-laws required; and the by-laws vested in the president the "general supervision of the affairs of the company." The policy was issued by the duly authorized agents of the company, and upon a full knowledge of all the facts material to the risk. The company can not successfully deny its liability thereon. The executive committee, as agents of the plaintiff, had no official duty to discharge in the actual execution and delivery of the policy. Their action was prelimi-

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nary, and in this instance must be held to have been waived. They were but the subordinates of the board of directors, and held their positions under appointment of the board. Their duties were subordinate, and imposed for the convenient transaction of business. The non-action of this committee should be held no defense to a suit on the policy, and can, therefore, be no defense here. The case at bar is wholly unlike *Plahto v. the plaintiffs*, 38 Mo. 248, and *Mound City Ins. Co. v. the defendants*, 42 Mo. 374; but the *U. M. F. Ins. Co. v. Keyser*, 32 N. H. 313, is in point as an authority adverse to the defendant. That was a suit on a premium note. The defense was that the note and policy were void because the risk had been taken in violation of the company's by-laws; but it was held that this fact did not avoid the policy, or the note which was given in consideration of the policy.

The defendant's motion in arrest was properly overruled. It has no tenable ground to stand upon. Nor can we say that the court erred in overruling the defendant's motion for a new trial, so far as that motion was based on an allegation of newly-discovered evidence. That was a matter resting in the sound discretion of the judge trying the case; and there is nothing to show that the action of the court in this particular was unwarranted. In fact, the alleged newly-discovered evidence had little or no bearing upon the issues made by the pleadings.

Upon the whole, it is my opinion that the judgment should be affirmed. The other judges concur.

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THE DAVENPORT NATIONAL BANK, Respondent, v. HENRY A. HOMEYER *et al.*, Appellants.

1. *Contract—Bill of lading, negotiability of.*—In a qualified and restricted sense, a bill of lading has the attribute of negotiability, and may be transferred by indorsement and delivery.
2. *Contract—Bill of lading—Delivery without indorsement.*—The delivery of a bill of lading without indorsement, for value, transfers the property in the goods which it covers.

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3. *Contract—Bill of lading attached to draft—Delivery without indorsement.* A. consigned to B., as his factor, 300 barrels of flour, and drew on him for the amount due. The draft was discounted by a bank on the faith of the bill of lading issued on the flour. The bill was attached to the draft as collateral security, and thus transferred to the bank, but was not indorsed or formally assigned, B. having refused to accept the draft. *Held*, that he was not at liberty to appropriate the flour or its proceeds to his own use. It was the property of the bank, for the purpose of meeting the dishonored draft.

*Appeal from St. Louis Circuit Court.*

*Krum, Decker & Krum*, for appellants.

The mere delivery of the receipts gave the respondent no title to the property covered by them, and no claim upon the fund realized from its sale, there being no indorsement or appropriate written words of assignment. (*Conant v. Atlantic Ins. Co.*, 1 Pet. 386, 445; *Merch. & Mech. Bank of Chicago v. Hewitt*, 3 Iowa, 93, 103; *Law v. Hatcher*, 4 Blackf. 364-6; *Conrad v. Atlantic Ins. Co.*, approved in *Gibson v. Stevens*, 8 How., U. S., 384, 399; *Salters v. Everett*, 20 Wend. 267, 280; *Winslow v. Norton*, 29 Me. 419; *Newsom v. Thornton*, 6 East, 17, 41; *Stone v. Swift*, 4 Pick. 389.)

*E. W. Pattison*, for respondent.

Respondent acquired title to the flour to the extent of its advances. The assignment of a bill of lading transfers the property in the goods mentioned therein. (1 Pars. on Cont. 239; 1 Pars. on Maritime Law, 138 *et seq.*; Abb. on Shipping, 333; *Lickbarrow v. Mason*, 1 Smith's Lead. Cas. 588; *Coxe v. Harden*, 4 East, 217; *Lawes on Charter Parties*, 324, 326; *Caldwell v. Ball*, 1 T. R. 216.) Such assignment by the shipper passes the legal title to the property against the shipper's agents, factors, or creditors. (*Conrad v. Atlantic Ins. Co.*, 1 Pet. 387, 445; *Nathan v. Giles*, 5 Taunt. 558; *Nichols v. Clent*, 3 Price, 547; *Haille v. Smith*, 1 Bos. & Pul. 563; *Kinloch v. Craig*, 3 T. R. 119; *Bruce v. Wait*, 3 Mees & W. 15; *Archer v. McMeechan*, 21 Mo. 45.) And this, too, though the consignor be indebted to the factor for advances on previous consignments. (*Story on Agency*, §§ 376-7; *Bank of Rochester v. Jones*, 4 Comst., N.

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Y., 497; 2 Kent's Com. 640, note 1; Allen v. Williams, 12 Pick. 297; Walter v. Ross, 2 Washb. C. C. Rep. 283; Dows v. Greene, 32 Barb. 490; Grove v. O'Brien, 8 How. 429; Lowery v. Steward, 25 N. Y. 239.) The bill of lading is often spoken of as a negotiable instrument. It is, however, only *quasi* negotiable. The assignment of a bill of exchange transfers the contract; the assignment of a bill of lading transfers the property. (Thompson v. Downing, 14 Mees & W. 40; Rowley v. Bigelow, 12 Pick. 315; Haille v. Smith, 1 Bos. & Pul. 569.) Any act on the part of the consignor which indicates his intention to transfer the property is sufficient; and if done *bona fide*, for a valuable consideration, is good against the world, whether done by manual delivery of that which is the symbol of the property, or by a written instrument. (8 How., U. S., 399, 400.) And the assignee has, if nothing more, at least an equitable lien on the shipment. (Kimball v. Donald, 20 Mo. 579; Bryan v. Nix, 4 M. & W. 789-90.) And the power of the consignor over the bill of lading for this purpose is not changed by the fact that a consignee is named in it, so long as it is in the hands of the consignor. (Valle v. Cerre's Adm'r, 36 Mo. 586-7; Allen v. Williams, 12 Pick. 297; Mitchell v. Ede, 11 Ad. & E. 903; Conrad v. Atlantic Ins. Co., 1 Pet. 445; Abb. on Shipping, 326, note, 338; Grove v. O'Brien, 8 How. 439; Barrow v. Coles, 3 Campb. 92.) It follows from the above that it was not requisite that the railroad receipts should have been indorsed by the consignors. (Cases above cited, especially 8 How., U. S., 400.) Even a promissory note may be assigned without indorsement. (Boeka v. Muella, 28 Mo. 180; 3 Mon. & Ayrf. 219; 2 Jac. & Walker, 243.)

CURRIER, Judge, delivered the opinion of the court.

In February, 1867, S. M. & D. A. Burrows, of Davenport, Iowa, consigned to the defendants, as their factors or commission merchants, 300 barrels of flour. The flour was shipped by railroad in two parcels, and the usual bills of lading issued therefor by the carrier. The consignors at the same time drew on the consignees, against the flour, three drafts of \$900 each.

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These drafts were discounted by the plaintiffs upon the faith of the bills of lading, which were deposited with them as collateral security. The bills of lading were not indorsed or formally assigned in writing. They were attached to the drafts, and thus transferred to the bank. The consignors were at the time in arrear to the consignees for advances made on account of prior shipments. The advances had been made with an expectation, on the part of the consignees, of a continued business.

Upon this state of facts the question arises whether, for the purposes of the discount, the mere manual delivery of the bills of lading vested in the plaintiff such title to the flour that they can hold it or its proceeds as against the defendants.

In a qualified and restricted sense, a bill of lading has the attribute of negotiability. Various authorities cited by the defendants' counsel show that this is so, and that such contracts may be transferred by indorsement and delivery. This is undoubtedly the accepted doctrine on that subject. It does not thence follow, however, that a transfer by manual delivery merely would be nugatory or ineffectual as against the consignor's factor to whom the goods described in the bill of lading may have been shipped, as in the present case. But this is the defendants' point. It is plausible, but not sound. Nor is it sustained by the authorities cited in its support. *Law v. Hatcher*, 4 Blackf. 364, goes no further than to affirm the proposition that the title to goods conveyed by a bill of lading would pass from the consignor to a purchaser by an indorsement and delivery of the bill of lading to the vendee. This is but the common doctrine affirmed by all the cases. The question whether a mere manual delivery of the bill, without a written indorsement, would not have had the same effect is a point not noticed in the case. Nor is it raised in the other cases to which the defendants' counsel refers us. *Storm v. Swift*, 4 Pick. 389, was a suit for malicious prosecution. It was there decided that the holder of an unindorsed bill of lading could not sue upon it in his own name. In *Buffington v. Curtis*, 15 Mass. 497, it was held that an indorsement of the bill of lading without a delivery of it did not transfer the title to the goods. In *Allen v. Williams*, 12 Pick. 297 it was held

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that where the bill of lading was filled up with the name of a particular consignee or bearer, the mere delivery of the bill by the shipper for value passed the property, as against the named consignee. And the court say that whether the transferee acquired, by delivery of the bill of lading, an absolute property in the goods, or a lien only, was immaterial.

But it is urged that, although it be true that the delivery of a bill of lading without indorsement conveys the title to the goods it covers, when by the terms of the bill the goods are deliverable to "bearer," still it would be otherwise when, as in this case, the bill contained no word or provision of equivalent force or meaning. This distinction is not shown to be recognized by any adjudicated case.

The adjudication in the *Bank of Rochester v. Jones*, 4 Comst. 497, sustains fully the proposition that the delivery of a bill of lading for value, although unindorsed, and containing no provision for the delivery of the goods to bearer, carries with it the property in the goods covered by the bill, as against the consignor's factor; and this, although the consignor was indebted to his factor for advances made on account of prior shipments. That case and the case at bar are quite identical in all their material facts and circumstances.

The bill of lading represents the property therein described, and a delivery of the bill is treated as a symbolical delivery of the property. A written indorsement may be necessary to transfer the contract so as to enable the transferee to sue on it in his own name, as in *Buffington v. Curtis*; but the delivery of the bill of lading without indorsement, for value, transfers the property in the goods. In the *Bank of Rochester v. Jones*, the court say: "The true ground on which to sustain this transfer of property is by regarding the transaction as a sale to the bank in trust, to deliver the property to the consignee in case he accepted the drafts; and if he refused to accept, then to sell the flour, and to retain out of the proceeds the amount of the drafts, and to pay the surplus to the consignor."

In the case at bar, the shippers were the owners of the flour, and had absolute control over it. They consigned it to the



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defendants, and drew upon them against the shipments, delivering over to the plaintiff the bills of lading as collateral to the drafts which the plaintiff discounted. The defendants having refused to accept, they were not at liberty to appropriate the flour or the proceeds of it to their own use. It was the property of the plaintiff for the purpose of meeting the dishonored drafts.

This substantially disposes of the case. It discloses no facts of a character to defeat the rights of the plaintiff, acquired in virtue of their negotiation and arrangement with the shippers of the flour. The evidence shows that the defendants anticipated further shipments, but there is no evidence of any concluded arrangement between them and the Burrows to that effect, or that the defendants ever made any advances on the flour in question. Nor are the defendants helped in their resistance of the plaintiff's claim by the circumstance that one of the Burrows was a *femme covert*.

In my opinion, the judgment ought to be affirmed. The other judges concur.

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ERNEST DOEBLING *et al.*, Appellants, *v.* CECILIA LOOS *et al.*,  
Respondents.

1. *Practice, civil — Instructions — Evidence — Account, note given in payment of — Receipt — Jury.*—In a suit on an account, the mere acceptance by the plaintiff of notes given by defendant for the debt, and the giving of a receipt for the amount due, without further proof, does not constitute such evidence of payment as to warrant the court in sending the case to the jury.

*Appeal from St. Louis Circuit Court.*

*Van Waggoner*, for appellants.

I. Before the instruction in question could be given, it must appear that the notes were taken in satisfaction of the account. (McMurray v. Taylor, 30 Mo. 263.)

II. Only an express agreement and understanding between the parties will make a promissory note payment of an open account and extinguish the original debt; and the giving of a

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receipt in full for the original debt is not evidence of such agreement. (Cole v. Sackett *et al.*, 1 Hill, 516; Muldon v. Whitlock, 1 Cow. 290; Frisbie v. Larned, 21 Wend. 450; Glenn v. Smith, 2 Gill. & J. 493; case of Thompson, 2 Browne, 297.)

*Beal*, for respondents.

The plaintiffs took notes of Louis Loos in payment. (2 Pars. Cont., ch. 3, p. 136; Sto. Prom. Notes, § 104; 21 Wend. 450.)

CURRIER, Judge, delivered the opinion of the court.

This is a proceeding to enforce a mechanics' lien. The plaintiff executed certain work for Louis Loos, deceased, and received the latter's four negotiable promissory notes in settlement, giving a receipt as follows: "St. Louis, July 15, 1866. Received of Louis Loos thirteen hundred dollars, in full of all my demand to date." One of the notes was paid, and the remaining three were offered to be surrendered at the trial; and it was shown that these had not been paid. The answer of Loos' administratrix alleged that the claim sued on had been paid and satisfied. In support of this issue the defendants read in evidence the aforesaid note and receipt, and rested. There was no other evidence given at the trial which had any tendency to prove the alleged payment. Doebling, the plaintiff, testified in the cause, and was inquired of respecting the settlement, but nothing was elicited which conduced to show a satisfaction of the claim beyond the fact of the acceptance of the notes and the giving of the receipt. He in fact testified that he was unable to read English, and was wholly unaware of the contents of the receipt, and that he did not regard the settlement as a satisfaction.

The court instructed for the defendants; upon this state of the testimony, that "if the jury believed from the evidence that the plaintiff, upon a settlement with Louis Loos, took the notes offered in evidence as payment in full for the account described in the petition, and executed the receipt read in evidence with the intention of closing the accounts and relying on the notes as security, then they should find for the defendants."

The plaintiff objected to the instruction ; and the only question in the case demanding notice arises upon the action of the court in giving it. The objection to the instruction is that there was no evidence upon which to found it. The point is well taken. The mere acceptance of the notes and the giving of the receipt did not constitute such evidence of payment as warranted the court in sending the case to the jury. In other words, the acceptance of the notes and the giving of the receipt did not make even a *prima facie* case of payment.

The case at bar can not be distinguished in principle from that of *McMurray v. Taylor*, 30 Mo. 263, where it was held that the acceptance of the debtor's note for the amount due on an open account, and receipting for it, as taken in settlement of the account, did not constitute such evidence of payment as warranted the submission of the cause to the jury. In *Frisbie v. Larned*, 21 Wend. 452, Cowen, J., in discussing this subject, said: "The case is different from that where a party gives his own note for his own debt, which is accepted as in full. There, on default of payment, the creditor has his election to go back to the original cause of action on surrendering the note to be canceled. The note, in such cases, is not even *prima facie* satisfaction ; but it is otherwise of a note against a third person transferred by the debtor, or a note procured from a third person as surety and accepted as satisfaction." This undoubtedly is a correct statement of the current doctrines governing transactions of the character mentioned, and harmonizes with the decision in *McMurray v. Taylor*. (See also 2 Pars. on Cont. 624 ; Sto. on Prom. Notes, § 104, 5th ed. ; *Peters v. Beverly*, 10 Pet. 567.)

The judgment must be reversed and the cause remanded. Judge Bliss concurs. Judge Wagner absent.

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State of Missouri ex rel. Miller, relator, v. Daily, Clerk Crim. Court.

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STATE OF MISSOURI *ex rel.* WM. P. MILLER, Relator, *v.* PETER P. DAILY, CLERK OF ST. LOUIS CRIMINAL COURT, Respondent.

1. *Practice, criminal—Costs, exemption from payment of—Law relating to, in United States.*—The only feature of the English law relating to the exemption of poor persons from liability to pay costs, adopted in the criminal practice of the United States, is the obligation of the court to assign counsel for such accused persons as are unable to employ any.
2. *Practice, criminal—Appeal—Transcript—Clerk must make out transcript, although costs are unpaid.*—The duty (under Gen. Stat. 1865, ch. 215, § 16) of sending up a proper transcript, upon *supersedeas* in a criminal prosecution, is imperative, and is personal to the clerk, without the application of the accused; and for the performance of this duty the law imposes upon no one the obligation of advancing the fees.

*Appeal from St. Louis Criminal Court.*

*Peacock & Hart*, for relator.

*Patrick & Drummond*, for respondent, cited *People v. Rockwell*, 2 Scammon, 3; *People v. Harlem*, 29 Ill. 43; *Knapp v. Lambert*, 3 Gray, 377; *Purdy v. Peters*, 23 How. 328; 15 Abb. Prac. 160; *Gardner v. Gardner*, 2 Gray, 434; *Carpenter v. People*, 3 Gilman, Ill., 147; *Sans v. People*, *id.* 338; *King v. Fry*, 1 Leach's Crim. Cas. 129; 1 Chit. Crim. Law, 482; *Rex v. Clark*, 3 Burrows, 1308; *Hullock's Law of Costs*, § 220, n. 1.)

BLISS, Judge, delivered the opinion of the court.

The relator was convicted of a felony in the St. Louis Criminal Court, appeals to this court, and the clerk refuses to send up a transcript. To an alternative writ, directing him to make out, certify, and return a transcript of the record as required by law, he replies that he has made it out, certified it, and has offered to return it to this court upon payment by the relator of the fees due for making it, which he refuses to do.

Having given an opinion adverse to the claim of the clerk, we are asked to review it, and have given the matter new consideration. An appeal and *supersedeas* was allowed by the Criminal Court upon probable cause, or so much doubt as to render it expedient to take the judgment of this court upon the judgment

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below (Gen. Stat. 1865, ch. 215, § 3), and there the case rests. How is the defendant to get into this court? The matter is disposed of, so far as the Criminal Court is concerned, and he might be very well satisfied to let it remain as it is with the sentence unexecuted. The case can only come here by a transcript, which, by section 16 of chapter 215, the clerk is imperatively required to make, certify, and return to the office of the clerk of this court. In civil cases, if the appellant fails to see that his transcript is filed, the respondent may produce one and take judgment; but in criminal cases, if it is not sent by the clerk upon *supersedeas*, according to the requirement of section 16, or not produced by the appellant when there is no *supersedeas*, according to section 17, I know not how the case will get here, or how the sentence is to be executed.

If the clerk's duty is limited by the ability or willingness of the accused to pay him for the transcript, he need only to procure the allowance of the *supersedeas*, and then postpone indefinitely or defeat altogether the execution of the sentence. There is a marked distinction in appeals where there is a *supersedeas* and where there is none. In the latter case (section 17) the transcript is to be "made out, certified, and returned on the application of the appellant or plaintiff in error, as in civil cases," and it may, perhaps, be reasonably inferred that the clerk would have the right to require his fee before delivering it to him, though that question we are not called upon to decide. In the one case the appeal comes here by the action of some court or judge, and the State is interested in its speedy decision, while in the other it is brought by the defendant at his option.

The respondent to this relation objects to any inference as to his duty from the difference in the requirements of sections 16 and 17, inasmuch as the latter section requires the transcript to be returned on application of appellant, "as in civil cases," and the requirement as to sending it up in civil cases is substantially the same as in said section 16. (See section 19, chapter 172.) If this requirement in relation to civil cases stood alone, there would be force in the argument, but there is another provision which modifies the provisions of section 19, chapter 172, and

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both taken together imply an active agency in the appellant. I refer to section 29, chapter 135, Gen. Stat. 1865, which says that "the appellant shall cause to be filed in the office of the clerk of the Supreme Court, at least fifteen days before the term of such court to which the appeal is returnable, a perfect transcript," etc. No such duty is imposed upon the appellant in criminal cases when a *supersedeas* has been allowed; nor is it contemplated that he has any active agency in bringing his case into the appellate court. In this view, if this relator had not desired a review of the judgment below, and applied for this writ, it would have become the duty of the attorney for the State to make this application.

In the former opinion reference was had to the liberal provisions of our statutes in securing the costs of clerks in criminal cases, without noting the exception to costs made by the defendant when convicted, in which case he alone is responsible for them. (Gen. Stat. 1865, ch. 219, § 3.) While, at common law, clerks and prothonotaries might in general insist upon their fees for services to individuals, they receive nothing from the king. The king neither paid nor recovered costs, and in many of the States the rule is partially retained. In most of the western States all that is allowed to clerks for their services in criminal cases, where there is no conviction, is a small annual allowance from their respective counties; while in Missouri everything is paid by the State or county, except the prisoners' costs upon conviction. In the vast number of indictments often improvidently found by grand juries, and never even prosecuted, the officers of court draw full fees, and thus swell the criminal costs of Missouri far beyond those of neighboring States.

I infer, also, that payment of this fee, as claimed by respondent, is not contemplated by the statute, from the care shown by our laws to give accused persons their full protection. The right to the opinion of the appellate court is carefully secured, and for probable cause the execution of the sentence is suspended until that opinion is had. No trial court, or judge thereof, or judge of the Supreme Court, will thus suspend execution unless the accused makes a case that entitles him to another hearing upon



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State of Missouri ex rel. Miller, relator, v. Daily, Clerk Crim. Court.

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the law; and if he must pave the way to such hearing by fees, this right might be denied him.

Respondent claims that the relator could only be excused from his liability to pay this fee by being admitted to defend against the indictment *in forma pauperis*. Our civil code adopts the provisions of the English law upon this subject, so far as to permit poor plaintiffs, in certain cases, to prosecute their action without giving security for or paying costs; but the only feature of it adopted in criminal practice is the obligation of the court to assign counsel for such accused persons as are "unable to employ any."

The whole claim, really, of the respondent is founded upon the assumption that the law will not require one's services without compensation. But this, so far as it applies to those who aid in the administration of justice, is a mere assumption. Circuit attorneys are compelled to prosecute, and only receive a fee upon conviction. Other attorneys are assigned to defend poor persons, and they are compelled to obey the order, but I know not the provision of law that secures their compensation. Witnesses and jurors formerly received nothing, or but a nominal sum, and now their fees are only intended to cover their expenses. It may be hard to compel clerks to make long transcripts, and run the risk of receiving no pay; it sometimes is burdensome, but if the law requires it, it is a part of the duties of their office. Their obligation in this regard is considered at some length in *Miami v. Blake*, 21 Ind. 32.

The duty, then, of sending up a proper transcript, upon *supersedeas* in a criminal prosecution, is imperative, and is personal to the clerk, without the application of the accused. It becomes essential to the further prosecution of the case, and to the execution of the judgment, in which the accused may have no interest; is a duty imposed after an order of *supersedeas* by the court or a judge, and is essential to the object of the order; and for the performance of this duty the law imposes upon no one the obligation of advancing the fees.

A peremptory *mandamus* will therefore issue. The other judges concur.

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Harney v. Charles et al.

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WILLIAM S. HARNEY, Respondent, v. BENJAMIN F. CHARLES  
et al., Appellants.

1. *Equity—Taxes, lands sold for, redemption of—Ignorantia legis.*—Within the time allowed to redeem certain lands sold for taxes, the owner, having been in the military service, made tender, under the act of March 12, 1867, of the amount of the tax, with ten per cent. interest. This being refused, he filed his petition to enjoin the delivery to the purchaser of his tax deed. The court, after the proceeding had remained in court till after the time for redemption had expired, decided the act relied on to be unconstitutional and the claim of the owner to be invalid, but allowed him to add to his tender the amount required by the statute to redeem, although the time of redemption had lapsed, and on payment of costs made the injunction perpetual. *Held*, that the rule *ignorantia legis*, etc., did not apply to such case, especially as the delay beyond the time of redemption was caused in part by the action of the court, and that equity in the premises properly relieved against such mistake of law.

*Appeal from St. Louis Circuit Court.*

Hill & Jewett, for appellants.

Gantt, for respondent.

BLISS, Judge, delivered the opinion of the court.

In 1866 the plaintiff's land was sold for the delinquent taxes of 1864, and one of the defendants became the purchaser. In 1868, before the expiration of the two years allowed for redemption, he tendered to the county authorities of St. Louis county the amount of the tax for which it was sold, with six per cent. interest, which they refused to receive. The plaintiff claimed that he came within the provisions of the act of March 12, 1867, allowing those who were in the actual military service of the United States until two years from their discharge to redeem their land which had been sold for taxes, and upon payment only of the amount of the tax and six per cent. interest. Under this view, after the refusal to receive his tax, he filed his petition in the Circuit Court, and obtained an injunction to restrain the delivery to the purchaser of his tax deed for the property, which proceeding was retained in court until after the expiration of the two years allowed by the general law to redeem lands sold for taxes,

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when, upon hearing the court decided against his claim, but under the general prayer in the petition, the dissolution of the injunction was conditioned upon the failure of the plaintiff to bring into court, for the use of the purchaser, the amount paid by him at the sale, with the statutory penalty of a hundred per cent., and interest at the rate of ten per cent. The plaintiff complying with this condition, the injunction was made perpetual, and upon appeal to general term the judgment was affirmed, with the modification that the plaintiff should pay the costs.

The plaintiff does not complain of the judgment below, and we will treat the ruling of the court as correct as against him. But the defendant objects to the permission given him to amend his tender, and claims that it can only be sustained upon the assumption that courts of equity have power to relieve against mistakes of law. It is doubtless true as a general proposition that courts of equity will only grant relief from mistakes of fact, and that all are supposed to know the law. (Yet it is also true that in peculiar circumstances equity will relieve as well from mistakes of law.) In every case there is such special equity as to make it an exception to the rule, and the exceptions are so numerous that the rule is by no means a universal one.) Judge Story labors to narrow the exceptions, but is compelled to admit that both in this country and in England they are so numerous as greatly to qualify the rule. (See Story Eq., §§ 116, 139, notes, and the numerous cases cited. See also *Evants v. Strodes*, administrator, 11 Ohio 480, and *Hunt v. Rousmaniere*, 8 Wheat. 174, and 1 Pet. 1.) But in all the cases the party applied for relief from the effects of his action, basing his application upon a mistake of law. The case at bar is different. The plaintiff applied to the court for an injunction against conveying his property and involving its title in a cloud, after having tendered and brought into court the amount designated by the statute. The court held him entitled to the relief, but say that he did not bring in money enough—that the statute upon which he relied was unconstitutional, because retroactive; but under the circumstances he should not suffer from his mistake, but should be permitted to add to his tender the amount required by

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the old statute. I know this action appears to conflict with the maxim, *ignorantia legis*, &c. Every one is presumed to know not only the statutes and common law, but also what acts are constitutional and what not—a matter which so often embarrasses the courts. It would not do to adopt any other general rule. And yet where can we find a more equitable exception? Especially when we consider that the delay beyond the two years given him to redeem by the old statute was caused in part by the action of the court. The injunction was allowed under the same view of the law that had deceived the plaintiff. The judge allowing it considered the tender sufficient, but after the case had been held for full consideration, and until it had become too late for the plaintiff to avail himself of the general law, the court decided that, notwithstanding the new statute, he must pay the statutory penalty, and allowed him, under the circumstances, to bring it into court. By this action, the court, in a sense, excused him for his mistake; for it was his duty in the first instance to tender the whole amount, penalty and all. Being, as it were, taken by surprise that the statute itself was held unlawful, he was permitted at the hearing to supply his omission, and, for his ignorance, mulcted in the costs. The court thus saved his limitations, which in ordinary action is preserved by section 19 of chapter 191, Gen. Stat. 1865, after nonsuit or reversal. There was no such error as would justify us in reversing the judgment, which will be affirmed at the costs of the plaintiff. (It must not be understood, however, that we hold that chancery will interfere in ordinary cases to relieve a party from his legal mistakes.)

Judge Currier concurs. Judge Wagner absent.

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ALEXANDER GILLESPIE, Appellant, v. JAMES P. EARLY,  
Respondent.

1. *Partnership—Weight of testimony not passed on by Supreme Court.*—In suit to recover a moiety of partnership assets, this court will not pass on the question of the weight of testimony.

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O'Reilly et al. v. Nicholson et al.

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*Appeal from St. Louis Circuit Court.*

*Davis & Bowman*, for appellant.

*R. S. McDonald*, and *F. Garvey*, for respondent.

CURRIER, Judge, delivered the opinion of the court.

The plaintiff and defendant were partners. According to the allegations of the petition, the firm assets passed into the custody and control of the defendant. This suit is brought to recover the plaintiff's moiety of their value. The case was sent to a referee to state the account and find the facts. On the coming in of his report the plaintiff moved to set it aside, and for a review. The motion was overruled, and, from the order of the court overruling the motion, the plaintiff appealed.

No statement or brief in behalf of the appellant is found in the papers. On the oral argument it was urged that the referee's report was unwarranted as not being founded on evidence. That was the only point taken. On looking into the evidence, it appears that there was testimony tending to prove the facts found by the referee. The weight and preponderancy of that testimony is not re-examinable here; and the order of the court overruling the plaintiff's motion must be affirmed. The other judges concur.

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MICHAEL B. O'REILLY *et al.*, Appellants, v. ISAAC NICHOLSON  
and ISAAC WHITE, Respondents.

1. *Equity—Relief—Jurisdiction—Judgments, when not impeachable collaterally.*—The informality of a judgment, even to the extent of granting a relief not contemplated by the petition, when parties are before the court and the relief is within its jurisdiction, is not a void proceeding, and can not be impeached collaterally.
2. *Equity—Devises of lands; of money in lieu of—Election—Conveyance of land pending election—What title conveyed.*—When the testator devises the interest of certain heirs in a specified tract of land to other members of his family, and also devises to said heirs certain moneys as their full share and just proportion of the land, the equity doctrine of election applies; the appearance of the heirs in court and their renunciation of the land is also an election; and the attempted conveyance by them and its acceptance by

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the purchaser during suit in partition of the land, and while the election is being made, especially when the purchaser acted as a sort of attorney for them, and drew and swore them to their answer in that suit, is a gross and naked fraud attempted to be perpetrated upon the other heirs of the testator, a contempt of the court in which the proceedings are pending, and possesses no validity whatever.

3. *Lis pendens*—*Deed void*.—The deed of a party *pendente lite* is void, and even an innocent purchaser would take nothing by his deed, and could convey nothing; and a purchaser *pendente lite* is bound by the decree that may be made against the person from whom he derives title.

*Appeal from St. Louis Circuit Court.*

*Hitchcock & Lubke*, for appellants.

I. The recitals in the decree, being upon a matter collateral and incidental to the issues, are not conclusive. (15 N. H. 17; *Minor v. Walter*, 17 Mass. 237; 2 Am. Lead. Cas. 792-813.)

II. A decree is not constructive notice to any persons who are not parties to it. (1 Sto. Eq., §§ 405-407.)

III. The decree itself, so far as it undertook to convey the two-ninths interest of Mrs. Lount and Julia White to the other parties to that suit, was void for want of jurisdiction. (2 Smith's Lead. Cas. 676-7; *King v. Chase*, 15 N. H. 9.)

IV. This is not a case of election. (2 Story's Eq. § 1086.)

*Garesche & Mead*, and *Mortell*, for respondents.

I. A purchaser *pendente lite* was bound by the decree. (2 Sugd. on Vendors, 104, § 19; 1 Story's Eq. 393, § 406; *Kern v. Hazelrigg*, 11 Ind. 446; *Harrington v. Slade*, 22 Barb. 166.)

II. The land court had jurisdiction over both of the parties and of the subject-matter. (2 R. C. 1855, p. 1592, § 2; *Buchanan v. Dersaimet*, 21 Mo. 585; *Wohlien v. Speck*, 22 Mo. 310; *Segond v. Garland*, 23 Mo. 547; *City, to use of Lohrum, v. Coons*, 37 Mo. 44; *Patrick v. Abeles*, 27 Mo. 184; *Mulloy v. Lawrence*, 31 Mo. 583.)

BLISS, Judge, delivered the opinion of the court.

The plaintiffs bring ejectment against defendants, claiming two-ninths in a twenty-acre tract of land in St. Louis county, as heirs of John O'Reilly, deceased.



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The record shows that Isaac White, father of defendant, died in 1841, and was the owner of the land. He left it by will to Sophia, his wife, for life, remainder to his children in fee, who, during her life, all released to her except Virginia, who became the wife of Samuel S. Lount, and Julia S. In 1858, Sophia White, the widow, died, having made a will by which she gave \$800 each to said Virginia and Julia, to be paid at once, and \$1,000 each, in addition, to be paid on the settlement of her estate; and she directed the sale of her property, and division of its proceeds among six of the other children, naming them. Virginia and Julia each received their \$800, according to the will, and soon after their mother's decease, in June, 1862, W. L. Thirwell, executor of the will, presents to the St. Louis Land Court his petition setting forth the will, the partial settlement of the estate, describing all the real estate, including the twenty acres, as belonging to said Sophia at her death, averring that said Virginia (then married to Samuel S. Lount) and Julia are entitled to \$1,000 each, not yet paid them, and that the balance of the estate belongs to six of the other seven children, naming them, and asks judgment that the property belonging to the estate be sold for the purpose of carrying out the will, and also asks for partition. Samuel S. Lount, Virginia Lount, and Julia White answer and deny that said Sophia owned said real estate, but aver that two-ninths of it belonged to said Virginia and Julia, as heirs of their father, the said Isaac White. The record shows none of the proceedings in the case until the decree which was rendered in May, 1863, only as the decree, which is long, refers to evidence submitted. The decree, after describing all the real estate in full, finds, among other things, that the said Julia and Virginia and said Sophia believed that she, said Sophia, the mother, owned in fee the entire estate, with full power to dispose of it, and that she intended to give said Virginia and Julia the said \$1,800 each, "as their full share and just proportion of the real estate," as well as personalty. It also recites that the personal estate is insufficient to pay the \$1,000 each due said Julia and Virginia; and, after further reciting that they appear in open court and relinquish all title and claim to the real estate,

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orders that all the interest had by them at the commencement of the suit or now, be divested out of them and invested in the other heirs, subject to the payment of said \$1,000 each; and that the executor proceed to sell sufficient of said real estate to pay the \$2,000, etc., and make report of his proceedings, etc. At the same term, and two days after the decree, and while the matter was pending, the said Virginia and Julia "filed in said suit" their release of their interest in the estate, except so far as it is chargeable with the payment of their legacies. The decree was entered under date of May 21, and the release filed May 23; and the record shows further that on the 22d of May, Samuel S. Lount and his wife, the said Virginia, and said Julia, for the consideration of ninety-nine dollars, executed to one Bernard a deed of their interest of two-ninths of said twenty acres of land. The deed was acknowledged by John S. Bowman and filed for record, according to the recorder's certificate, at half-past 9 o'clock, May 23. Bowman testifies that he, and not Bernard, was the real purchaser, and that the consideration was a credit upon Lount's account for the ninety-nine dollars; and afterwards Bernard deeded to him, and he sold to John O'Reilly for \$600. The plaintiffs, as his heirs, bring this suit. The judgment below was for the defendants.

The case seems to have turned upon the validity and legal effect of the decree, and upon the notice to the plaintiffs of its existence. First, plaintiffs' counsel contend that the decree itself was a nullity, and that it can hence be impeached collaterally. But the decree is not a nullity. It is true the petition hardly lays the foundation for the relief given; but the court had jurisdiction both of the subject-matter of the petition and the subject-matter of the decree. The object of the petition was for authority to raise money out of the land to pay the legacies, and the court added to the order sought, substantially, an election by the legatee to take the legacy and release the land, with an order carrying out that election. The court had a right to do both; and, if the petition did not lay a foundation for both, the decree is simply erroneous, but can not be impeached collaterally. A judgment, though informal, even to the extent of granting a

relief not contemplated in the petition, when parties are before the court and the relief is within its jurisdiction, is not a void proceeding.

Let it be considered, as the plaintiffs' counsel claims, that the paper filed had not the requisites of a conveyance, still it was evidence of an election, and their appearance in court and the declaration there as recited in the decree was also an election, and the doctrine of election applies to just such a case as this. The record does not show what evidence was before the court, but there was enough to satisfy it that the testatrix had devised the interest of Virginia and Julia in certain lands to other members of the family, and had also devised to these, then unmarried, daughters \$1,800 each in cash as their full share and just proportion of the lands. The testatrix, as the court found, did not intend these daughters to have the money and land too, but the money in lieu of land, and, it being inequitable for them to take both, they came into court, renounced the land, and filed an instrument in writing to the same effect.

The doctrine of election ordinarily applies to inconsistent or alternative donation, but it has also other applications. Swanson, in his note to *Dillon v. Parker*, 1 Swans. 394, so strongly commended by Story, says: "The owner of an estate having, in an instrument of donation, applied to the property of another expressions which, were that property his own, would amount to an effectual disposition of it to a third person, and having by the same instrument disposed of a portion of his estate in favor of the proprietor, whose rights he assumed, is understood to impose on that proprietor the obligation of either relinquishing (to the extent of at least indemnifying those whom, by defeating the intended disposition, he disappoints) the benefit conferred on him by the instrument, if he asserts his own inconsistent proprietary rights, or, if he accepts that benefit, of completing the intended disposition by the conveyance in conformity to it of that portion of his property which it purports to affect."

In *Pemberton v. Pemberton*, 29 Mo. 409, this court held that where a husband bequeathed to his widow a share belonging to his children, and made their children his residuary legatees, they

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must relinquish the share or renounce the legacies. It was held to be a case for election.

In the record under consideration, evidence *dehors* the will was doubtless received, but even if this were erroneous—upon which there are contradictory decisions—it would not make the election void. For purposes of this action, the proceeding and decree under them are to be treated as wholly free from error.

The character, then, of the attempted conveyance of Virginia Lount and her husband and Julia White, and its acceptance by Bowman while the election was being made, especially in connection with the fact that Bowman acted as a sort of attorney for them, drew and swore them to their answer, is very transparent. It was a gross and naked fraud attempted to be perpetrated upon the other heirs of Mrs. White, a contempt of the court in which the proceedings were pending, and possesses no validity whatever. Mrs. Lount attempts to excuse herself by saying that she was ignorant of the character of the paper, and signed it by direction of her husband, since dead. This, if true, may extenuate her criminality, but in no way affects the nature of the transaction.

The defendants insist, however, that John O'Reilly, from whom they claim, was an innocent purchaser, inasmuch as he had no notice of the decree, which was never recorded. There was a failure to put this decree upon the proper record, and that failure and its supposed effect was doubtless the cause of the purchase by John O'Reilly. He employed his brother, one of the plaintiffs, to examine the records, who did not find it, and when asked why he did not look into the records of the Land Court, replied that it was not his business, intimating properly enough, in a proper case, that those records were not the place to look for record evidence of title. But what was the relation of John O'Reilly to this proceeding? We have seen that Bowman was fully cognizant of the suit in the Land Court, and was a party to the fraud. O'Reilly was his clerk, and hence in confidential relations with him. No one would believe from that fact alone and from the further fact that the consideration was a nominal one compared with the value of the property, that he did not

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have knowledge sufficient to put him upon his guard. But further, it is in evidence that he knew of this suit—talked about it, and the chances of the purchase becoming a good speculation, and that Bowman, before his death, gave him a bond to return him \$300, half the consideration, if the speculation should fail. This bond, in connection with the fact that Bowman by his warrantee deed was already obligated to him for the whole, if the title failed, strongly indicates a partnership interest in the transaction.

Upon trial below, under instructions of the court in regard to notice, the jury returned a verdict for defendants, and judgment was rendered upon it. Had those instructions been erroneous, the judgment, being so clearly for the right party, should not be disturbed. But the error in the instructions was really against instead of in favor of the defendants. The court went altogether too far in sustaining the plaintiff's claim. The instruction holds that the deeds of Virginia Lount and Julia White to Bowman, and of Bowman to John O'Reilly made the plaintiff's title good, "unless John O'Reilly, before the deed to him from Bowman was made and delivered to said O'Reilly had actual notice of the decree which has been read in evidence made in the suit of Thirwell, executor, &c., against Isaac White, or of the existence of said suit."

The error of this instruction consists in the assumption that the deed of Virginia Lount and Julia White, pending the suit to which they were parties, had any validity whatever as against the other parties. It was a deed of a party *pendente lite*, and void. If Bowman had been an innocent purchaser, even he would have taken nothing by his deed, and could convey nothing. A contrary rule would make litigation endless. As well might the plaintiffs to this suit convey during its progress the premises in dispute to a third person, and compel the opposite party to litigate the matter over again. The authorities are clear and conclusive upon this point. The Master of the Rolls, in *Winchester v. Paine*, 11 Ves. 194, on page 197, says: "Ordinarily, it is true, the decree of the court binds only the parties to the suit. But he who purchases during the pendency of the suit is bound by the decree

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that may be made against the person from whom he derives title. The litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them, it is as if no such title existed. Otherwise, suits would be indeterminable," etc. See also *Murray v. Ballou*, 1 Johns. Ch. 566. The rule is older in law than in equity, and was adopted by Lord Bacon from the common-law courts, and in the case at bar it effectually prevents the plaintiffs from claiming title through this deed of Virginia and Julia White against any of the parties to the former proceeding. It becomes quite unnecessary to consider the technical accuracy of the instruction in regard to notice, as the plaintiff's title is wholly worthless.

Judgment affirmed. Judge Currier concurs. Judge Wagner absent.

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JOSEPH JECKO, Trustee of Caroline C. Hume, and CAROLINE C. HUME, Respondents, v. WILLIAM TAUSSIG, Appellant.

1. *Terms "fee," "fee simple," "fee simple absolute," meaning of.*—In modern estates the several terms "fee," "fee simple," and "fee simple absolute," are substantially synonymous.
2. *Conveyances—Fee simple—To married woman—Authority of to convey, with remainder, over to heirs, etc.*—Certain land was conveyed to a married woman and her trustee, "to be sold and conveyed in fee, mortgaged or rented," as she might, in writing, direct. The deed further provided that, in case of her death before her husband's, the estate might vest in her surviving children; *held*, that her authority to convey was absolute and unlimited, and that the latter provision did not affect her power of alienation during the life of her husband: *semble*, that equity will enforce specific performance of a contract to purchase an estate so conveyed upon tender of deed to the purchaser.

*Appeal from St. Louis Circuit Court.*

*Taussig & Kellogg*, for appellant.

I. Respondent is not entitled to equitable relief by a decree for specific performance. (31 N. Y. 91; *McLean v. White*, 5 Maine, 178.)

II. Without the clause authorizing a conveyance in fee, the deed would undoubtedly create an estate in remainder in the heirs



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of the bodies of John F. and Caroline Hume, who would take as purchasers as well at common law as under our statute. The rule in Shelley's case would not apply, even if the statute were not in force. (2 Washb. on Real Prop., last ed., 556, 575, note 4; Webster v. Cooper, 14 How. 500; Gen. Stat. 1865, ch. 108.)

III. An estate in fee is not by any means necessarily an estate in fee simple absolute, and the right to convey in fee does not necessarily give the right to convey an estate in fee simple absolute. (Preston on Estates, 479 *et seq.*; 1 Washb. on Real Prop. 51-2, 62-4; *id.* 444 *et seq.*)

*Jecko & Hospes*, for respondents.

CURRIER, Judge, delivered the opinion of the court.

This is a proceeding in the nature of a petition in equity for the specific enforcement of a contract to purchase real estate. The suit is amicable, and the facts of the case are all agreed.

The points presented for adjudication involve the construction of a deed from S. D. Barlow and wife, to the plaintiffs, who, as the grantees therein, are described as "Joseph Jecko, trustee of Mrs. Caroline C. Hume, wife of John F. Hume, and Caroline C. Hume." The *habendum* clause of the deed is in the words following: "To have and to hold the same (the premises described in the deed) to the said Joseph Jecko and his successors in trust—in trust, however, for the following uses and purposes, viz: for the use, occupation, and benefit of said Caroline C. Hume, free from all control and power of disposition or encumbrance on the part of her husband, John F. Hume; to be sold and conveyed in fee, mortgaged or rented, as she, the said Caroline C. Hume, may in writing direct; and the proceeds, issues, and rents to be paid to her or her order, without the interference or control of her husband, or any one claiming under or through him. The object and purpose being to invest said Caroline C. Hume with said property and its improvements and appurtenances, subject to her sole use and occupation, without interference from any person, with the limitation only which is hereby made a condition of the trust herein created to-wit: that

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in case of the death of the said Caroline C. Hume, or her husband, John F. Hume, the said property shall at once vest in and belong to the children of the bodies of said John F. Hume and Caroline C. Hume, subject to a life interest in said Caroline C. Hume, should she be the survivor, and their heirs; and the said Joseph Jecko, or his successor in trust, shall, in that case, hold said property for their benefit, or convey the same upon their written order, or that of their legal guardian."

The original statement shows that Mr. and Mrs. Hume had two children, the issue of their marriage, living at the date of said deed, and that they are still living, as is also said John F. Hume, who joins his wife and her trustees in the execution of the deed tendered to the defendant in execution on their part of the contract of sale. There are no provisions in the other parts of the deed affecting the construction to be placed upon the *habendum* clause recited above. The question presented is, does this deed vest in the grantees therein an inheritable estate in fee simple? or, in other words, does it vest in them such an estate, and give them such power and dominion over the granted premises during the lifetime of John F. Hume, that they may at any time during that period, by an appropriate deed, alien and convey the same in fee simple absolute?

The deed authorizes a conveyance in "fee." Much stress is laid upon the distinction which is supposed to exist between an estate in "fee" and an estate in "fee simple absolute." It is urged that a right to convey in "fee" does not necessarily give the right to convey in "fee simple absolute." The distinction in question may have once existed and had practical force and importance in England. In this country, however, it is apprehended that such distinction has become dim and shadowy, at least in the general mind. The term "fee" implies an inheritable estate, and the addition of the word "simple," forming the compound word "fee simple," as used in "modern estates" and conveyancing, adds nothing to the force and comprehensiveness of the original term. (1 Washb. on Real Prop. 65-6.) And Mr. Washburn says that a "fee simple is the largest possible estate which a man can have in lands, being an absolute estate

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in perpetuity;" and further, that "an estate in fee simple conveys at once the idea of an interest of unlimited duration." (*Id.* 59, 66.) Nor does the addition of the term "absolute," as "fee simple absolute," add anything to the force and meaning of term "fee" or "fee simple." (*Id.*) In modern estates these several terms, "fee," "fee simple," and "fee simple absolute" are substantially synonymous.

It is nevertheless true that an estate in fee simple may be granted in such way and upon such conditions that it may be defeated by the happening of some future event. But the grant of power and authority to Mr. Jecko and his *cestui que trust*, during the lifetime of Mr. Hume, to alien and convey, is trammelled with no conditions whatever. The authority is absolute and unconditional. Nor is it perceived that the circumstance that the estate might vest in the surviving children of Mr. and Mrs. Hume, upon the death of the former, no conveyance in the meanwhile having been made, affects the question of the power of alienation vested in the grantees during the life of said Hume. The interest and estate of the children was contingent upon the non-exercise of that power, prior to Mr. Hume's decease.

Departing from verbal criticism and the definition of technical terms, and looking at the deed with the view to the ascertainment of what the parties intended by it, it is manifest that the intention was to vest in the grantees therein named an absolute power of alienation in the fee simple absolute, so that power should be exercised during the lifetime of said John F. Hume. So much is apparent upon the face of the instrument. Nor is this denied. The intention being evident and conceded, that intention must have effect in construing the instrument, although the force of technical terms and phrases may be thereby modified, restricted, or enlarged. Prior decisions of this court substantially settle the principle involved in the present discussion. (*McDowell v. Brown*, 21 Mo. 58; *Pendleton v. Bell*, 32 Mo. 100.)

The plaintiffs, in writing, contracted to sell and convey, and the defendant contracted to purchase, the premises in question. The purchase money was to be paid in part by a transfer of various stocks and bonds. The plaintiffs duly tendered their

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deed, to which the defendant objected on the ground of defect of title and want of power of alienation. That objection has already been considered; but the further question is started, whether a court of chancery has jurisdiction to decree specific performance in a case of this kind. No specific reason why the relief sought should not be granted is stated, and none is perceived. (Hardy v. Matthews, 42 Mo. 406; Hall v. Warren, 9 Verm. 608; Leach v. Fobes, 11 Gray, 506; Hall v. Sturdivant, 46 Maine, 34.)

With the concurrence of the other judges, the judgment will be affirmed.

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CHARLES GIBSON, Plaintiff in Error, v. CHOUTEAU'S HEIRS,  
Defendants in Error.

1. *Clerical errors—Judgments nunc pro tunc—When may be entered.*—Where the clerk of a court fails to enter judgment, or enters up the wrong judgment, there is no doubt about the existence of power in the court to correct the matter, and order the proper entries to be made at any time. The court may always at subsequent terms set right mere forms in its judgment, or correct misprisions of its clerks, or any mere clerical errors, so as to conform the record to the truth. But when the court has omitted to make an order which it might or ought to have made, it can not at a subsequent term be made *nunc pro tunc*. In all cases in which an entry *nunc pro tunc* is made, the record should show the facts which authorize the entry.

*Motion to correct judgment.*

*Chas. Gibson*, for the motion, cited 39 Mo. 573; State v. Clark, 18 Mo. 432; 10 Mo. 359; Commonwealth v. Wistar, 3 Pet. 431; Graham v. Lynn, 4 B. Monr. 18; United States v. McKnight, 1 Cranch, 84.

*Glover & Shepley, contra.*

The record of this court was closed here by a final order of this court in 1867, and the court has no power to touch it. (10 Mo. 359; 18 Mo. 432; 19 Mo. 127.) The court has changed; there is only one judge now on the bench who made the order. It is the court who are to certify what questions arose—the court that decided the cause. Reasons are not injected into judgments.

The reasons belong to the opinion of the court—not to its orders. They are not part of the record proper, but may be made so by bills of exception or by a certificate, under section 25 of the judiciary act of 1789.

WAGNER, Judge, delivered the opinion of the court.

Motion by plaintiff praying for the correction of two former judgments rendered in this cause, respectively, at October term, 1866, and at the March term, 1867. At the first argument of the cause in this court at the October term, 1866, final judgment was given for plaintiff. The counsel for defendants then moved for a rehearing on one single point only—namely, the statute of limitations.

After consideration, the motion was sustained and a re-hearing granted as to that point, and the case was set for re-argument at the next ensuing term. At the hearing in the March term, 1867, the prior rulings of this court were not disturbed—indeed they were not open for consideration, excepting on the single question of the statute of limitations, and the judgment was reversed on that question, and that only. In making up the records, the clerk omitted to state any special ground for which the re-hearing was granted, but made a general entry, stating that the “judgment heretofore entered in this cause be, and the same is hereby set aside, and this cause is docketed for a new hearing.” In like manner, in entering the last and final judgment, at the March term, 1867, the record disclosed a general judgment of reversal which included and covered the whole ground of controversy.

Plaintiff prosecuted his writ of error from the decision of this court to the Supreme Court of the United States, and in that court the writ was dismissed for the reason that it did not appear that the judgment of this court was based exclusively on the question of the statute of limitations, and that it might have been founded on other issues not reviewable in the Supreme Court of the United States.

The question now is, whether this court will correct the judgments and enter them *nunc pro tunc*, so as to impart validity to them as of the term when they should have been so rendered.

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The main ground taken in resisting the motion is, that the terms having passed at which the judgments were rendered, the motion can not be granted; that judgments *nunc pro tunc* can only be rendered during the progress of the cause, and not after the case has been finally disposed of and the term has elapsed. There is no dispute or contention about the facts in the case—the records of this court show them to be as above stated. The first judgment of this court was undisturbed except as to one point—the statute of limitations—and the final judgment was an express affirmance of that ruling in all things, the reversal being predicated solely on that statute.

The plaintiff was entitled to have the actual facts appear on the record, and their failure to so appear was a clerical error or mistake of the clerk. Where the clerk fails to enter judgment, or enters up the wrong judgment, there is no doubt about the existence of power in the court to correct the matter, and order the proper entries to be made at any time. The court may always, at subsequent terms, set right mere forms in its judgments, or correct misprisions of its clerks, or any mere clerical errors, so as to conform the record to the truth. (Hanly v. Dewes, 1 Mo. 16; Sibbald v. United States, 12 Pet. 492; Medford v. Dorsey, 2 Wash. 433; Bank v. Wistar, 3 Pet. 431; Weston's case, 11 Mass. 417; Jackson v. Weisiger, 1 Bibb, 324; Keams v. Rankin, 2 Bibb, 88; Lawrence v. Cornell, 4 Johns. Ch. 542; The Palmyra, 12 Wheat. 10; Hammer v. McConnell, 2 Ohio 32; Com. Dig. Amend., T. 1.)

In Hyde v. Curling, 10 Mo. 359, it was held that a court has power to order entries of proceedings had by the court at a previous term to be made *nunc pro tunc*. But where the court has omitted to make an order, which it might or ought to have made, it can not, at a subsequent term, be made *nunc pro tunc*. In all cases in which an entry *nunc pro tunc* is made, the record should show the facts which authorize the entry.

In the case of State v. Clark, 18 Mo. 432, Hyde v. Curling was approved, and it was declared there was no doubt of the power of the Court to make *nunc pro tunc* entries on the record in furtherance of justice.



The record here shows all the facts authorizing the amended entry, and justice demands that the order be made. The record should be made to conform to the truth, and the plaintiff should not be deprived of the privilege of prosecuting his suit on account of a mere mistake in entering judgment.

The motion will be sustained and a judgment *nunc pro tunc* entered. The other judges concur.

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JOHN S. McCUNE, Respondent, v. HENRY B. BELT et al.,  
Appellants.

1. *Bills of exchange and promissory notes—Accommodation—Parties—Liability.*—In commercial law, in the absence of a contract, the accommodation indorsers of a promissory note are not co-sureties, but are held in the order of their indorsements. As to the liabilities of parties to bills of exchange, there is but one rule known to the law. The drawer of the bill—if accepted—is bound to all other parties. Upon his default the drawer becomes obligated to the indorser, and the indorsers, if there are more than one, are bound in the order of their indorsements, and the accommodation parties to the bill should not be held to those for whose benefit it is drawn. But all the accommodation parties, as between themselves, are bound by the obligations which they assumed under the law merchant by becoming such parties.
2. *Bills and notes—Parties—Co-sureties.*—Parties to bills and notes who intend to become co-sureties, should so agree, or should all be drawers, merely, so the payee and indorser should also be drawers.
3. *Bills and notes, co-sureties—Equity—Indemnity of one inures to the benefit of all.*—It is a settled principle of equity that if one of several co-sureties subsequently takes a security from the principal for his own indemnity, it inures to the benefit of all the sureties, so far as they are co-sureties. But so far as he has a security for individual claims which he has against the same person, he is entitled to hold it.
4. *Debtor and creditor—Payments where several debts are due between the same parties, how applied.*—Under ordinary circumstances, when payments are made upon several debts, due the same person or upon a running account, the debtor making them may say upon which debt or item of account they shall apply, or, if he makes no election, the creditor may make the application; and if neither of them decides the matter, then it must apply upon the oldest or one first maturing. And if the creditor once makes the application he shall not be permitted to change it, if afterwards circumstances make it for his interest to do so. But the rules are controlled by the equities of the case.

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*Appeal from St. Louis Circuit Court.*

The material facts in the case are sufficiently stated in the opinion of the court. See also same case, 38 Mo. 281.

*Whittelsey*, and *Gantt*, for appellants.

I. Plaintiff and defendants hold to each other the relation of co-sureties for John J. Anderson & Co., and, therefore, the plaintiff was only entitled to recover of defendants one-half of the amount paid by plaintiff upon the bill sued on. (*Dering v. Earl of Winchelsea*, 1 White & T. Lead. Cas. Eq. 60; 1 Cox, 318; Lead. Cas. Eq. 60, Am. ed. 1852, pp. 100, 115, note; *Craythorne v. Swinburne*, 14 Ves. 169; *Mayhew v. Crickett*, 2 Swanst. 192; *Ramsey v. Lewis*, 30 Barb. 403; *Norton v. Coons*, 3 Denio, 130; *Stout v. Vauce*, 1 Rob. 169.) "Where successive accommodation indorsers all indorse for the accommodation of the maker, though at different times, and without communication or mutual understanding, they are, in equity, co-sureties, subject to common contribution." (*Daniel v. McRae*, 2 Hawks, 590, 598, 604; 1 White & T. Lead. Cas. Eq., Am. ed. 1852, p. 115, notes; *Bell v. Jasper*, 2 Ired. Eq. 597, 601.)

II. The defendants, as sureties, were entitled to have the benefit of the securities deposited by John J. Anderson & Co. with the plaintiff. (*Dering v. Earl of Winchelsea*, 1 White & T. Lead. Cas. 100, 102, Am. ed. 1852, pp. 68, 106, note; *Miller v. Woodward*, 8 Mo. 169; *Hayes v. Ward*, 4 Johns. Ch. 123; 1 White & T. Lead. Cas. Eq. 119; *Ramsey v. Lewis*, 30 Barb. 403; *Truescott v. King*, 6 N. Y. 147; *Brown v. Ray*, 18 N. H. 102.) Where a surety, before he paid the debt, took securities to indemnify himself, his co-sureties are entitled to share the benefit of the security. If there are several demands with different co-sureties, and the security be taken generally as an indemnity, it is to be applied *pro rata* among all the demands. (*Brown v. Ray*, *supra*; *Copperthwaite v. Sheffield*, 1 Sandf. 416, 452; *Moore v. Moore*, 4 Hawks, 358, 360.) As between co-sureties, an indemnity taken by one is to be held for the

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mutual benefit of all. (1 White & T. Lead. Cas. Eq., Am. notes 119, and cases cited; United States v. Amory, 5 Mas. 455; United States v. Linn, 2 McLean, 501; United States v. Wardwell, 5 Mas. 82.)

III. The payments made by John J. Anderson & Co., December 27, 1860, should have been applied to the bill then due, as the deposit account was afterward extended in full for nine and twelve months, and deed of trust taken as security. An item credited to general account must be considered as an application of it by the plaintiff to the oldest items of the account. (Allen *et al.* v. Culver, 3 Denio, 284.) The items of payment credited as on general account on March, 1861, in the account rendered Anderson in 1864, must, as to plaintiff, be considered as applying to the oldest items of the account, and the plaintiff can not, therefore, as against a surety, repudiate this order of credit. (Truescott v. King, 2 Seld. 147; United States v. Kirkpatrick *et al.*, 9 Wheat. 720; 1 Am. Leg. Cas. Eq. 135; P. M. Gen. v. Furber, 4 Mas. 333.) The payment made December 27, 1860, should have been applied to the bill then due (Cloney *et al.* v. Richardson, 34 Mo. 370), because it was a debt then payable, the deposit account having been extended in March, 1861, thus showing that it was not applicable to that account. (1 Am. Leg. Cas. Eq. 142; Ramsey v. Lewis, 30 Barb. 403.) Admitting that plaintiff was a creditor taking securities from his debtor, still he was bound to consult the interest of the sureties, and, having stated an account with the principal debtor, he can not afterwards repudiate the credits, when controversy has arisen, and attempt to make a different statement and apply the credits in a different manner. (United States v. Kirkpatrick, 9 Wheat. 720.)

*Ewing & Holliday*, and *Glover & Shepley*, for respondent.

The plaintiff and defendants were not co-sureties on this bill. "If they become sureties by successive indorsements on mercantile paper—as that is a form of contract which, in general, binds the first to indemnify the second—the law presumes that they mean to stand as they have placed themselves. (McNeilly v. Patchin, 23 Mo. 43; McDonald v. Magruder, 3 Pet. 474.) It

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is not pretended that there was any agreement between the plaintiff and defendants at the time of their placing their names upon the paper. The defendants stand in no relation to the plaintiff to demand any application of payment of the amount the plaintiff may have collected from the securities, so long as it is shown that there remains unpaid more than the amount of the bill sued on. Until the amounts received from these collaterals have made McCune whole up to within the amount of this bill, no amount received by McCune can benefit the defendants. There can be no application of payment as between these parties, because they do not stand in the position of co-sureties. McCune has the right, for his indemnification, to resort to all the securities he has. The taking by McCune, after he received these securities, of notes of Anderson & Co., at a future time, instead of allowing the debt to remain as an open account, cuts no figure here for two reasons: first, because the security was given to secure the debt, and the debt was not changed by putting it into the form of a promissory note; and second, because, rejecting these notes, McCune has not received enough on these collaterals to reimburse him for the other two drafts paid by him, and interest.

BLISS, Judge, delivered the opinion of the court.

This cause has once been before this court and is reported in 38 Mo. 281. A new trial has been had and the case is again here upon exceptions to the ruling of the court. The questions not heretofore decided are but few, and in order to understand them it is not necessary to recite the numerous instructions given and refused upon the last trial. The defendants drew a bill of exchange upon Anderson & Co. for \$5,000 at sixty days, in favor of the plaintiff, which bill was indorsed by him, accepted by the drawee, and discounted at the bank. The drawers and indorser had no interest in the paper, but became parties to it for the accommodation of Anderson & Co., the acceptors. It was protested at maturity, the indorser paid it, and now brings suit against the drawer. Several questions were raised upon the second trial, which it is claimed were not decided when the case was here before.

The defendants claim that, although they are the drawers of the bill, yet as both they and the indorser are but accommodation parties, they ought to be held as co-sureties merely, and that the drawers should not be held to the ordinary liability to which they would be subject upon paper in which they were interested. Counsel have cited a number of authorities in support of their claim, but I find but one of them that even gives color to it. It is held in *Daniel v. McRae*, 2 Hawks, 590, that indorsers of an accommodation promissory note for the benefit of a third person, and when neither is benefitted, are to be considered as co-sureties. If this were the law, it would be reasonable to apply the rule to accommodation drawers and indorsers of bills, for their relation to each other is similar to that of successive indorsers of promissory notes. But in commercial law, in the absence of a contract, the accommodation indorsers of a promissory note are not co-sureties, but are held in the order of their indorsement. (2 Pars. on Notes and Bills, ch. 1, § 6; *McNeilly v. Patchin*, 23 Mo. 40; *Wilson v. Stanton*, 6 Black, 507.)

As to the liabilities of parties to bills of exchange, there is but one rule known to the law: the drawee, if the bill is accepted, is bound to all other parties. Upon his default the drawer becomes obligated to the indorser, and the indorsers, if there are more than one, are bound in the order of their indorsement. (Story on Bills, § 107.) This obligation may be varied by special contract. (*Dunn v. Wade*, 23 Mo. 207; *Kelley v. Few*, 18 Ohio, 441.) And the accommodation parties to the bill should not be held to those for whose benefit it is drawn. But all accommodation parties, as between themselves, are bound by the obligations which they assumed under the law merchant by becoming such parties. Co-securities can surely be held to contribution, and if the parties to this action held that relation, the judgment for the full amount of the bill would have been clearly erroneous. But, in the absence of any special agreement, their relation is to be determined by the instrument to which they are parties. If they intended to be co-securities, they should have so agreed, or should have been drawers merely; or if the payee and indorser so intended, they should have been also drawers. In Ohio an early

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decision made accommodation indorsers of a promissory note co-securities in acknowledged contravention of the general law, but in *Williams v. Blossom*, 11 Ohio, 62, the Supreme Court of that State refused to go further, and applied the rules of the commercial law to accommodation parties to bills of exchange.

The defendants also claim that the securities turned out to the plaintiff by the acceptors who had assumed obligations on their behalf, and was their creditor in the sum of \$25,000, besides this bill, should be applied *pro rata* upon the obligation now in suit. This claim is without foundation.

The assignment was made for the security of the plaintiff alone, and the defendants can have no interest in it, unless it inures to their benefit by virtue of their relation to the plaintiff upon the paper. If the plaintiff and defendants were co-sureties, the property turned out to one should inure to the benefit of all, for "it is a settled principle of equity that if one of several co-sureties subsequently takes a security from the principal for his own indemnity, it inures to the benefit of all the sureties." (1 White & Tud. Lead. Cas. in Eq., 3d Am., from 2d Lond. ed., notes on p. 62, and see cases there cited.) Defendants' counsel cite many authorities to sustain the above position, but they have no application to this case unless the relation of co-sureties between the parties is first established.

But if they were not co-sureties, it may still be claimed that the plaintiff was under obligation to apply the sureties received by him *pro rata* upon the indebtedness of Anderson & Co. to him, and upon all the debts upon which he was liable on their account. The debts upon which he was liable were the bill now in suit for \$5,000, an acceptance for \$10,000 drawn by the plaintiff and indorsed by defendants, and an acceptance for \$10,000 drawn by plaintiff and indorsed by Knapp & Co.

These two \$10,000 bills the plaintiff paid, as he was bound as drawer to do. Now, if the plaintiff's relation to all these four items named in the assignment, to-wit: the three bills and the deposit—were the same, we do not say that the other parties might not require him to apply the securities *pro rata*, for that would be equality. He might perhaps not be permitted to make



arbitrary distinctions when the rights of others would be affected, and where his own rights are not concerned. But that is not this case. Four-fifths of this indebtedness upon the bill he has been obliged to pay. The assignment was to him for *his* liability, not the defendants, and there is no equity in the claim unless their liability is also his, *i. e.*, unless they are co-sureties. In *Brown v. Ray*, 18 N. H. 102, where a co-surety, who had taken a security from the principal, also held personal claims against him, the court held that "the indemnity furnished by the security must therefore be apportioned among the several demands, as far as the sureties have an interest in it." And again, "they (the other sureties) come in for a share of the benefit so far as they are co-sureties, upon the ground that he has taken the security for indemnity against a liability common to them all, and that it is one therefore in which they have a common interest. So far as he has a security in which they have not such interest, he is entitled to hold it, and having obtained the security, without their assistance, for his own debts, as well as the other demands, he is entitled to apply it first to his own debts."

The other questions necessary to consider were decided when the case was here before, and it is wholly immaterial so far as defendants are concerned, whether the account between Anderson & Co. and plaintiff, criticised by counsel, be correct or not, as in any event the securities did not realize enough to cover the plaintiff's claims outside of this bill.

The judgment is affirmed. The other judges concur.

BLISS, Judge, delivered the opinion of the court upon motion for re-hearing.

The defendants present their motion for a rehearing upon the ground that the court overlooked the question of the distribution of the sums realized by the plaintiff from his securities. This question was certainly not unheeded, although in the opinion no special reference was made to the third division of defendants' brief. But we considered this question and the matters argued in that part of the brief as concluded by our view of the relation held by the parties to the bill in suit, and of the rights of the

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plaintiff therein. But it not being so understood, I will give more in detail the result of our deliberations.

Defendants claim that if they are not entitled to contribution, the collections made by McCune—to-wit: the proceeds of the securities turned over to him—should be first applied to the payment of the bill in suit because it first matured. Under ordinary circumstances, where payments are made upon several debts due the same person, or upon a running account, the debtor making them may say upon which debt or item of account they shall apply; or, if he makes no election, the creditor may make the application; and if neither of them decides the matter, then it must apply upon the oldest, or the one first maturing. And if the creditor once makes the application, he shall not be permitted to change it, if afterwards circumstances make it for his interest to do so. (*Allen et al. v. Culver*, 3 Denio, 284; *Gass v. Stinson*, 3 Sumn. 98.) But these rules are controlled by the equities of the case. (*Seymour v. Van Slyck*, 15 Wend. 19.)

This claim seems to have a two-fold aspect: first, that neither party made any special application, therefore the collection should apply upon the bill first due; and second, that the plaintiff actually applied it upon said bill. If the second aspect were true, it decides the matter in favor of the defendants; but the first is based upon an entirely incorrect view of the relation of the parties and the character of the assignment. All the receipts of plaintiff were from proceeds of the claims turned out to him by Anderson & Co. to indemnify him. He does not stand in the ordinary relation of creditor, holding several claims and receiving general payments; but, on the other hand, these payments, so called, are collections upon the securities turned out to the plaintiff for *his* benefit, and the prosecution of this suit shows his intention at the time of its commencement at least to appropriate them to his own indemnity, as we have seen he had a right to do. Had there been any previous actual appropriation of any of these collections to the payment of this bill? This view is said to be sustained by an account exhibited to Anderson & Co. in 1864. In that statement the plaintiff charged them with all their acceptances under date of their maturity, with sundry other charges of

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interest, etc., and the notes given him for balance of his deposits with them; and on the credit side are entered all the amounts then received upon the claims turned out to him, with interest. There is nothing in this statement to show any intention to apply the receipts upon any particular claim, and that intention can only be inferred from the fact that the bill in suit is charged as paid before the other bills, and the fact that the balance due on deposit had been put into notes. The material fact to be ascertained in this regard is plaintiff's intention; because if he decided to apply the receipts upon any particular item of charge, he is bound by that decision. But I see nothing to indicate any such intention. The account was made up at the time, the cash entries being taken from the Keokuk Packet Company's books, when the several sums were charged to him as having been paid for him, or credited him as having been received on his account. From these entries in the company's books he makes the statement, adding interest, etc., and the deposit notes. This account shows \$1,779.95 to have been received March 6, 1861, and \$749 February 10, 1862; and that the bill for \$5,000 was paid December 22, 1860, and the two \$10,000 bills January 21 and February 26, 1861. Nothing had been then received from the larger securities. It will be hardly claimed that the mere statement of payments and receipts of itself shows a design to apply the receipts upon any particular payment, so that if such application be made it must be by operation of law. But the law will not make it, because it would be in contravention of the rights of the plaintiff under the assignment, he, as we have seen, having the right, which he has not relinquished, to apply the fund upon the debts in which the defendants have no interest. If the account, as seems to be supposed by defendants' motion, was for general payments by Anderson & Co., upon their several debts, then these payments, in the absence of express appropriation, should apply upon the first debt. But they are not payments by A. & Co. in the proper sense of the term, but sums realized by the plaintiff from securities before received to indemnify him and not the defendants.

Defendants further claim that \$660 were received before either of the \$10,000 bills matured, and that that sum should apply upon

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the first bill. Whether this claim be correct or not, it was sustained by the Circuit Court, by giving, at defendants' instance, instruction numbered 11 in the record, as follows: "11. And all sums of money paid by said Anderson to plaintiff, or realized by the plaintiff from securities placed in his hands, prior to the maturity of the bill of \$10,000 due ninety days from date spoken of by the witnesses, must be applied to the bill sued upon, the plaintiff having accepted Anderson's notes at nine and twelve months for the debt due upon the deposit account," &c. The ruling upon this question having been in defendants' favor, they can not complain.

It is not to be inferred that we express any opinion upon the propriety of any of plaintiff's charges to Anderson & Co., either in relation to these bills, or upon collections or sales of securities. He is only entitled to his actual and reasonable expenses, and if, after deducting these, the securities have yielded, or shall yield, more than sufficient to pay the indebtedness upon which he has applied them the balance he must hold for the use of the defendants.

The motion is overruled. The other judges concur.

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STATE OF MISSOURI *ex rel.* SAMUEL S. WATSON, Defendant in Error, *v.* ROBERT P. FARRIS *et al.*, Plaintiffs in Error.

1. *Quo warranto*—*Lindenwood College—General Assembly—"Declaration and Testimony" signers.*—The charter of Lindenwood Female College provided that vacancies in its board of trustees should be filled by the presbytery which was "connected with the General Assembly of the Presbyterian Church in the United States of America, usually styled 'Old School.'" By resolution passed in May, 1866, the General Assembly resolved that if any presbytery should enroll one or more signers of a paper known as "The Declaration and Testimony," that presbytery should, *ipso facto*, be dissolved, and that its ministers and elders adhering to the General Assembly were authorized to take charge of the presbyterial records, to retain the same, and to exercise all the authority and functions of the original presbytery until the next meeting of the General Assembly. In pursuance of this resolution, the Presbytery of St. Louis was, by one of its members, pronounced dissolved, in September, 1866, for enrolling a signer of that paper. *Held*, that a presbytery so dissolved had no power to appoint trustees of Lindenwood College; and that on

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proceedings in *quo warranto* against such trustees, they were properly ousted in favor of others, appointed by a body composed of members of that presbytery adhering to the General Assembly.

2. *Ecclesiastical law—Old School Presbyterian General Assembly, powers of.*—The General Assembly of the Presbyterian Church, commonly known as "Old School," possesses the unlimited control of superintending the concerns of the whole church, and of suppressing schismatical contentions and disputations. It combines within itself all the branches which constitute the elements of a complete government, namely, executive, legislative, and judicial; and acts upon all subjects coming before it according as they belong to each or either of these departments. It possesses extensive original and appellate jurisdiction, and whether a case is regularly or irregularly before it is a subject for it to determine for itself; and no civil court can revise, modify or impair its action in a matter of merely ecclesiastical concern.

*Error to Sixth District Court.*

*Glover & Shepley, and Lackland, Martin & Lackland, and Lewis, for plaintiffs in error.*

I. No property right or power can be derived from a violation of the laws of the church by any party. (Inne, 271, 376, 378, 380, 385, 399; The Scottish Seceders, 1 Dows, 16; Muller v. Gable, 2 Denio, 492; The People v. Steele, 2 Barb. 397; Kniskern v. The Lutheran Church of St. John & St. Peter *et al.*, 1 Sandf. Ch. 439.)

II. The decisions of ecclesiastical bodies are final and conclusive on all subjects within their jurisdiction; but they may be controlled and examined by courts of law. (Smith v. Nelson, 18 Verm. 511; 11 N. Y. 243; 4 Whart. 531; Parish v. Tooke, 29 Barb. 256; Robertson v. Bullions, 9 Barb. 134; Watson *et al.* v. Avery *et al.*, 2 Bush. 332; Natal v. Gladstone, Law R., 3 Eq. Cas., 1; Inne, 266.)

III. The General Assembly in 1866 passed the decree dissolving and destroying the Presbytery of St. Louis in an event named. They had no lawful power derived from the constitution and laws of the church so to decree. The constitution and laws of the Old School Presbyterian Church had the force of a contract among the several persons entering into that ecclesiastical organization. By the terms of this contract, the directors of the college were to be appointed by the Presbytery of St. Louis.

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But what is that? Certain persons constituted, according to the constitution and ordinances of the church, into an ecclesiastical body. Its membership is liable to change; old members are continually going out, and new ones continually coming in. But this must be done according to the laws of the church. This was the contract. It was the lawful Presbytery of St. Louis that was meant by the charter. A presbytery made up arbitrarily, contrary to church laws, in defiance of church laws, is not a presbytery at all in the meaning of the charter.

IV. There is nothing in the laws of the church which tends to show that the General Assembly possesses original as well as appellate jurisdiction in the matter of process against gospel ministers or church members. (*Vide* Conf. Faith, 478 to 488.) If this be the law of the church, there might be two prosecutions going on at once. The General Assembly, after trying a case of its original jurisdiction, might be required to try the same case by appeal. No proper citation was issued to the signers of the declaration and testimony.

*H. Hitchcock*, with whom was *J. C. Orrick*, for relator.

I. The burden is on the defendants to prove a perfect title to the office, through an election duly held by the proper electoral body, in strict accordance with the charter provisions. Failing in any one material issue the judgment of ouster must follow. (Ang. & A. on Corp. §§ 115, 118, n. 2, 123, 126, 343; also §§ 756, 758, 759.

The charter clearly intended the successive elections of directors to be held by the presbytery of St. Louis, which was, and which should at the date of each election be, in connection with the "General Assembly." The proof was, that prior to April, 1867, and ever since, the body in question claimed, by defendants, to be the true "Presbytery of St. Louis," ceased, in fact, to have any ecclesiastical connection with the Old School General Assembly.

The corporation created by this Act was to have perpetual succession. One-third of its members, however, were to vacate their offices each year, and the succession was to be kept up



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forever by annual elections, to be held by another body not incorporated, but a mere voluntary ecclesiastical organization adopted *pro hac vice* by the Legislature. This electoral body the charter identifies forever; 1st, by its membership at the date of the Act; 2d, by its ecclesiastical relations. From the nature of the case the latter must have been intended as a perpetual and indispensable means of identifying the electoral body. (See Sedg. on Stat. and Const. Law, pp. 231, 233; Smith on Stat. and Const. Constr'n, §§ 486, 502, 574, 613, 712; People v. Utica Ins. Co. 15 Johns. 358, 380; Miller v. Gable, 2 Denio, 540; Rex v. Devonshire, 1 B. & C. 609.) The General Assembly, in May, 1867, expressly decided that this body, though claiming to be the "Presbytery of St. Louis, Old School," was not such, and had no connection as such with the Assembly.

II. The decision of the General Assembly as to the ecclesiastical *status* of the body in question, is conclusive of this cause: because—

1. Being a matter purely of spiritual cognizance, it is conclusive on the civil courts, which are bound to accept as final the decision of ecclesiastical courts as to questions of ecclesiastical right or relations. (See the following cases: Harmon v. Dreher, 1 Speer's Eq. 121; McGinnis v. Watson, 41 Penn. St. pp. 1, 14, 20, 30; Den v. Bolton, 7 Halstead's (N. J.) 205, 232; Commonwealth v. Green, 4 Wharton, 599; Robertson v. Bullions, 9 Barb. Sup. C. 78, 134; Shannon v. Frost, 3 B. Monroe, 258; Gibson v. Armstrong, 7 B. Monroe, 481; Harper v. Strauss, 14 B. Monroe, 56; also 42 Penn. St. 508; 3 Barr, 291; 4 Zab. 658; 2 Richardson's Eq. 215; 23 Ill. 456; 7 Dana, 195; 1 Edwards' Ch. 591, 592; 2 Denio, 492, 540; 20 Johns. 12; 3 Paige's Ch. 296, 301; 7 Verm. 291; Saxton's 577; 1 Sandford's Ch. 439; 2 Dessausure, 431; 1 Hoffmann's Ch. 202; 7 Paige's Ch. 77; 3 Edwards' Ch. 79; 1 Rich. 99.)

2. Even if this court would review the action of the General Assembly in 1866 and 1867, complained of by defendants as unconstitutional and void, such action must be sustained as in accordance with the principles and usages of the Presbyterian Church.

The constitution of the Presbyterian Church—by which is meant the Confession of Faith, Form of Government, and Book of Discipline, promulgated by its highest authority—is not a contract between the members and officers of that church, nor is it to be expounded and enforced as such, in reference to matters spiritual, by the civil courts. It is the formal statement of those tenets concerning religious faith, practice, and discipline, which the members of said church believe to be set forth in the revealed will of God, and to which, as a matter of conscientious obligation alone, and not for any consideration known to the law, they engage, when they unite with the church, to conform.

An essential principle of this constitution is that in all matters spiritual the decision of the church, through its constituted authorities, is final; and the General Assembly is the highest tribunal, from which there is no appeal. (Form of Gov., ch. 2, p. 409; *id.*, ch. 8, I, II; Conf. of Faith, 115, 131; Baird's Dig. 614, 615.) This highest church court represents in itself *all the churches* of the denomination. (Form of Gov., ch. 12, §§ 1, 4, 5, pp. 429–30.) It is a "homogeneous body, uniting in itself, without separation of parts, the legislative, executive, and judicial functions of the government; and its acts are referable to one or the other of them, according to the capacity in which it sat when they were performed." (Per Gibson, C. J., 4 Whart. 601.) The original powers of the Assembly, as set forth in the constitution, include that of "deciding in all controversies respecting doctrine and discipline," and that of "suppressing schismatical contentions and disputations;" and it may proceed to exercise these powers either on appeal or *proprio motu*, on "common fame." It has repeatedly dissolved synods and presbyteries of its own motion, and may lawfully enjoin upon any presbytery the doing of any act within the province thereof. (See Baird's Dig. 276–8, §§ 103–4, 107–8; *id.* 301–2, §§ 170, 173; *id.* 669, § 75; *id.* 728, § 127; *id.* 785, § 167.) And it has executed these powers by *ipso facto* ordinances. (*Id.* 774–9, § 157–9.)

The action of the Assembly in 1866 and 1867, which is here attacked as void, was in accordance with the constitution of the church, because—

1. The Assembly had the right, in May, 1866, to take original cognizance and jurisdiction of proceedings highly rebellious and subversive of its own authority, and it lawfully ordered the inferior church courts to exclude from seats therein, pending charges of schism and rebellion against them, persons publicly engaged in proceedings arraigned by the Assembly as rebellious. (See Baird's Dig. 726-9, book VII, § 126, 127.)

2. It had the right to affix to the violation of such order the penalty of *ipso facto* dissolution of the presbytery violating it, and such dissolution followed, in fact and in law, upon the offense committed. (See precedent in 1838, Baird's Dig. 774-9, §§ 157-9; *id.* 785, § 167.) And in this matter the action of the Assembly in May, 1866, was a legislative act, while its decision of the claims of rival organizations, in May, 1867, was a judicial act, in each case final and conclusive as matter of church law. (Per Gibson, C. J., in *Commonwealth v. Green*, 4 Whart. 601; see also Baird's Dig. 253-4, § 46; 669, § 94; 692, § 106.)

III. The action of the General Assembly in May, 1867, was conclusive in respect to the *status* of the so-called presbytery of St. Louis, by virtue of whose action defendants claim here, and must be so treated by the civil courts, because—

1. The question of the ecclesiastical *status* of the so-called presbytery became *res adjudicata* by that decision. The Assembly was the highest church court, and was the final tribunal to which by the act of entering that church all its members agreed to refer all ecclesiastical questions.

2. Even if the constitution of the Presbyterian Church should be regarded as a mere contract, subject to be expounded and enforced in all its parts by the civil courts in reference to questions purely of ecclesiastical *status*, yet by the terms of the contract such a decision would be conclusive. (Story on Contracts, § 985 *h*; *Boston Water Power Co. v. Gray*, 6 Metc. 166; *Bishop of Natal v. Gladstone*, 3 Eq. C. (L. R.) p. 48; *Inne's Law of Creeds*, pp. 288, 311, 317, 319; also see *Forbes v. Eden*, *Inne*, 261-2, and the *Cardross* case, *id.* 294-7.)

But the true theory, and the one adopted without exception in American courts, is, that as Church and State are to be kept

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wholly separate, so civil courts, while they will in all cases examine and enforce civil rights, will also accept as conclusive the decisions of ecclesiastical tribunals upon questions purely spiritual, and where civil rights depend on an ecclesiastical matter, "will take the ecclesiastical decisions, out of which the civil right arises, as it finds them." (Harmon v. Dreher, 1 Speers', S. C., Eq. 87, 121.) Applying this rule to the case at bar, the body in virtue of whose action in April, 1867, the defendants claim office was not the Presbytery of St. Louis designated by the charter, and the supposed election was therefore void.

WAGNER, Judge, delivered the opinion of the court.

The circuit attorney of the nineteenth judicial circuit exhibited to the Circuit Court, sitting in the county of St. Charles, an information in the nature of a *quo warranto*, at the relation of Samuel S. Watson, against the defendants in this proceeding. The controversy grows out of a conflict in which different persons claim the right to act as trustees of Lindenwood Female College, an institution of learning situated in St. Charles county. The college was incorporated by an act of the Legislature of this State, approved February 24, 1853, and the third section of the charter provides that the management of the affairs of the corporation shall be vested in a board of fifteen directors, and that at all meetings of the board five members shall constitute a quorum for the transaction of business. Section 4 provides that the board of directors named in the act of incorporation shall be divided into three classes of five each, one class of which shall vacate their offices in each succeeding year. The section then further declares: "The vacancies in the board, caused by the expiration of the terms of service of each of said classes, shall be filled by the Presbytery of St. Louis, of which several of the incorporators are members, and which is connected with the General Assembly of the Presbyterian Church in the United States of America, usually styled the Old School." No difficulty ever arose, nor was there ever any dispute as to what body was entitled to fill the annual vacancies, till the fall of the year in 1866, when a disruption took place in the Presbyterian Church in St. Louis,

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resulting in the organization of two separate and distinct Presbyteries, each claiming to be the legitimate church organization, and therefore invested with the power of supplying the vacancies as they occurred.

The difficulty and dissension grew out of the action of the General Assembly of the Old School Presbyterian Church in issuing its deliverances on the subject of loyalty and slavery during the progress of the civil war through which the country has just passed. These deliverances inculcated loyalty, took strong ground in favor of the general government in the struggle then going on, and pronounced emphatically against slavery. A minority of the church, residing principally in the two States of Kentucky and Missouri, dissented from the views contained in the deliverances and wrote and published a paper called the Declaration and Testimony, in which the proceedings of the General Assembly were assailed with great acrimony and bitterness. This paper was signed by a number of the ministers and ruling elders of the church. In commenting on the action of the General Assembly the paper says: "The whole mediatorial glory and dignity of the Messiah has been thus tarnished, and all the offices of prophet, priest, and king, which He executes for the salvation of His people, are subverted and surrendered. If this, then, be not apostacy, surely it needs but little to make it so, clearly, unmistakably, fatally. Nothing can prevent this but the blessing of Almighty God upon the efforts which His faithful witnesses may make to arouse the people to the reality and extent of the evil and danger, and to bring them, by prompt and decided action, to purge the church of the evil influence which has corrupted and betrayed her. Against this corruption and betrayal, therefore, we testify in the sight of God, and angels, and men. We wash our hands of all participation in its guilt. We declare our deliberate purpose, trusting in God, who can save by few as well as by many, to use our best endeavors to bring back the church of our fathers to her ancient purity and integrity, upon the foundation of the apostles and prophets, and under the banner of our only king, priest, and prophet, the Lord Jesus Christ. In this endeavor we pledge ourselves to assist and co-operate with each

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other, and by the grace of God we will never abandon the effort, no matter what sacrifice it may require us to make, until we either have succeeded in reforming the church and restoring her tarnished glory; or, failing in this, necessity shall be laid upon us, in obedience to the apostolic command, to withdraw from those who have departed from the truth."

And the signers of the Declaration and Testimony sum up the line of action which they proposed to guide their future course as follows:

"1st. That we refuse to give our support to ministers, elders, agents, editors, teachers, or to those who are in any other capacity engaged in religious instruction or effort, who hold the preceding or similar heresies.

"5th. That we will extend our sympathy and aid as we may have opportunity to all who are in any way subjected to ecclesiastical censure, or civil disabilities, or penalties for their adherence to the principles we maintain, and the repudiation of the errors in doctrine and practice, against which we bear this our testimony.

"6th. That we will not sustain or execute, or in any manner assist in the execution, of the orders passed at the last two Assemblies on the subject of slavery and loyalty, and with reference to the conducting of missions in the Southern States, and with regard to the ministers, members and churches in the seceded and border States.

"7th. That we will withhold our contributions from the boards of the church—with the exception of the board of foreign mission—and from the theological seminaries, until these institutions are rescued from the hands of those who are perverting them to the teaching and promulgation of principles subversive of the the system they were founded and organized to uphold and disseminate. And we will appropriate the money thus withheld in aid of these instrumentalities which will be employed for maintaining and defending the principles affirmed in this declaration against the errors herein rejected, and in assisting the impoverished ministers and churches anywhere throughout the country who agree with us in these essential doctrines in restoring and building up their congregations and houses of worship.



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"8th. We recommend that all ministers, elders, church sessions, presbyteries and synods who approve of this Declaration and Testimony, give their public adherence thereto in such manner as they shall prefer, and communicate their names, and, when a church court, a copy of their adhering act.

"10th. We do earnestly recommend that on the — day of —, A. D. 1865, a convention be held in the city of —, composed of all such ministers and ruling elders as may concur in the views and sentiments of this Testimony, to deliberate and consult on the present state of our church, and to adopt such further measures as may seem best suited to restore her prostrated standards, and vindicate the pure and peaceful religion of Jesus, from the reproach which has been brought upon it through the faithlessness and corruption of its ministers and professors."

It will be thus perceived that the dissenters, in the Declaration and Testimony, arraigned the General Assembly as being guilty of betrayal, faithlessness, apostacy and corruption, and indicated their purpose to openly resist its authority, and in the event that they could not succeed in enforcing their sentiments, then they avowed their intention to withdraw from its control. Thus matters stood when the General Assembly, the highest court or judicatory known to the Presbyterian Church in the United States, met at St. Louis in May, 1866. Dr. Gurley, a member of that body, offered the following resolutions:

"*Resolved*, That this General Assembly does hereby condemn the Declaration and Testimony as a slander against the church, schismatical in its character and aims, and its adoption by any of our church courts as an act of rebellion against the authority of the General Assembly.

"*Resolved*, That the whole subject contemplated in the report, including the report itself, be referred to the next General Assembly.

"*Resolved*, That the signers of the Declaration and Testimony, and the members of the Presbytery of Louisville who voted to adopt that paper, be summoned, and they are hereby summoned to appear before the next General Assembly, to answer for what

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they have done in this matter, and that until their case is decided they shall not be permitted to sit as members of any church court higher than the sessions.

“*Resolved*, That if any Presbytery shall disregard this action of the General Assembly, and at any meeting shall enroll as entitled to a seat or seats in the body, one or more of the persons designated in the preceding resolutions, and summoned to appear before the next General Assembly, then that Presbytery shall, *ipso facto*, be dissolved, and its ministers and elders who adhere to this action of the Assembly, are hereby authorized and directed in such cases to take charge of the presbyterial records, to retain the same and exercise all the authority and functions of the original presbytery until the next meeting of the General Assembly.”

These resolutions were adopted by a vote of 196 ayes to 37 noes. (Assembly Minutes 1866, p. 60.) After this action of the General Assembly the Presbytery of St. Louis met in September of the same year. The facts necessary to be stated in connection with the disruption and reorganization of the presbytery are briefly these: After the formal meeting of the Presbytery for the transaction of business, and after the roll had been called and the absentees noted by the clerk, Mr. Niccolls, one of the members, protested against the admission of John J. Johns, to a seat in the body, on the ground that he was a signer of the Declaration and Testimony. Another member then offered a resolution or motion which seems to be admitted to have been the *ipso facto* edict of dissolution on the part of the General Assembly, which was ruled out of order by the Moderator. An appeal from the decision was taken, and this was declared also to be out of order, and the Moderator refused to put the vote. Farris, in his testimony, says the Assembly brethren undertook strategy, and that the intention to execute the *ipso facto* order of the General Assembly was evident, and that, after the Moderator had refused to put the vote on the appeal from his decision, Dr. Wilson obtained the floor and pronounced the presbytery dissolved by authority of the General Assembly, and called Dr. Niccolls to the chair as the former Moderator. “After this,” the witness says, “there was

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a great deal of disgraceful confusion in the house of God." Dr. Niccolls testified that, after the announcement made by Dr. Wilson, to the effect that by the authority of the General Assembly the Presbytery was dissolved, a motion was made that he (witness) take the chair as Moderator. The vote was put and carried. He then organized the presbytery with prayer, after which a motion was made and carried electing McCook stated clerk, and then the Presbytery on motion adjourned, to meet the next day at Kirkwood. The Declaration and Testimony members remained and proceeded with what they claimed to be the regular business of the presbytery, and adjourned after electing Gilbreath moderator, and Booth temporary clerk. In the following spring, April, 1867, this last mentioned body elected the defendants trustees of the Lindenwood Female College.

In May, 1867, each of these rival judicatories claimed representation in the General Assembly of the church, sitting at Cincinnati. A committee to whom the question of admission to seats was referred, reported adversely to the claims of the Declaration and Testimony Presbytery, and admitted the Assembly brethren. The report was concurred in by a vote of two hundred and sixty-one ayes to four noes (Assembly Minutes, 1867, p. 334.), the General Assembly at the same time declaring that the presbyteries in Missouri adhering to the General Assembly, and disclaiming the Declaration and Testimony, were to be respected and obeyed as the true and only lawful judicatories within the State of Missouri, which were in connection with and under the care and authority of the Presbyterian Church in the United States of America.

In 1868 the Declaration and Testimony Presbytery did not send commissioners to the General Assembly, and were not represented in that body, nor is there any evidence to show that they have had any connection with the same since that time. Such is a concise outline of the facts as developed in this case. It is contended on behalf of the defendants that the action of the General Assembly, in passing the resolution of Dr. Gurley, *ipso facto* dissolving the church organizations that maintained the Declaration and Testimony, or that admitted to seats, or permitted to be

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enrolled, the signers thereof, was *ultra vires* and void; that the General Assembly exceeded its jurisdiction; that its functions are appellate only; that it can only deal with, or take cognizance of, cases that come up regularly from the lower courts by appeal, complaint, reference, or review of their records, etc. On the other hand, it is argued for the plaintiff that the General Assembly is the aggregate of all the individual church presbyteries and synods, and has jurisdiction over all the synods, and concurrent original jurisdiction with each synod, presbytery, and session, down to each individual church.

And they further seek to derive authority for the course pursued in this case from the Form of Government, chapter 12, section 5, which says: "To the General Assembly also belongs the power of deciding in all controversies respecting doctrine and discipline; of reproof, warning, or bearing testimony against error in doctrine, or immorality in practice, in any church, presbytery, or synod; of erecting new synods when it may be judged necessary; of superintending the concerns of the whole church; of corresponding with foreign churches, on such terms as may be agreed upon by the Assembly and the corresponding body; of suppressing schismatical contentions and disputations, and, in general, of recommending and attempting reformation of manners and the promotion of charity, truth, and holiness through all the churches under their care." The argument that the *ipso facto* decree was a nullity proceeds on the theory that the offense with which the Declaration and Testimony members were charged could only be tried judicially, and that, before any sentence could be passed upon them, it was a necessary prerequisite that they should have been regularly cited, and full opportunity afforded them of making their defense. Were the General Assembly a court, proceeding according to the course of the common law, this position would be incontrovertible. It can not, however, be said that the persons arraigned were deprived of all opportunity to make their defense, for they were cited to appear and answer for what they had done—and the facts show that some actually did go—but still the citation was not such a service as would be required in a civil court. But whether the

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General Assembly had original jurisdiction in the case, and acted within the prescribed limits of its power, depends essentially on its structure and the authority vested in it in its formation. It is the highest ecclesiastical tribunal in the Presbyterian Church, and all organizations and members of the church act in subordination to it. It possesses the unlimited control of superintending the concerns of the whole church, and of suppressing schismatical contentions and disputations. It combines within itself all the branches which constitute the elements of a complete government, namely: executive, legislative, and judicial. Superintending the concerns of the church and suppressing schism are certainly not judicial acts. In a case entirely analogous to the one we are now considering, where the General Assembly, of its own motion, in 1837, excised the synods of Utica, Genesee, Geneva, and the Western Reserve, it was held by a court of the very highest authority and respectability that the Assembly did not exceed its power, and that the excising orders amounted to ordinances of dissolution, and were the valid exercise of a constitutional power.

In delivering the opinion of the court, C. J. Gibson said: "Could the synods, however, be dissolved by a legislative act? I know not how they could have been legitimately dissolved by any other. The Assembly is a homogeneous body, uniting in itself, without separation of parts, the legislative, executive, and judicial functions of the government, and its acts are referable to the one or the other of them, according to the capacity in which it sat when they were performed." (*Commonwealth v. Green*, 4 Whart. 531.) By reference to Baird's Digest it will be seen that the General Assembly has always claimed and freely exercised the power contended for. In 1837, as above stated, it entirely cut off and disowned four synods, which led to the formation of what is known as the New School Presbyterian Church. In 1839 it dissolved the synods of Tennessee and Michigan, and the ministers and churches which adhered to its authority were attached to other synods. There seems to have been no dissent as to its power and jurisdiction thus to act in the premises, among its own members. Where jurisdiction has for a long

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period of time been exercised by a court or body, the presumption is that it has been lawfully and rightly exercised. Every superior court must be the judge of its own powers and jurisdiction. It is true, the Supreme Court of the United States, the Supreme Court of the State, and the highest judicatory or court may err, and may do unconstitutional things, but what tribunal in such cases can exercise a revisory power and undo these things? Can an inferior court presume to decide that the superior court has transcended its power, and that its judgments are not obligatory? Suppose this court, in the exercise of its original jurisdiction, determines a matter which the Circuit Court or the County Court deems wrong, can one of these inferior tribunals disobey it, and, on that account, raise the standard of resistance and adjudge it to be invalid? If this were so, it would, in effect, be an appeal from the higher court to the lower court.

It is fit and proper that there should be an end to litigation, and an adjustment of difficulties, and to accomplish this end courts of last resort have been established. It does not follow that the judgments of the highest courts or judicatories are always right, for everything done by man is at best imperfect, and liable to be erroneous, but it is the best system which has yet been devised for the well-being of society and the protection of human rights. Now, the General Assembly is the highest court or judicatory known to the Presbyterian Church; it possesses extensive original and appellate jurisdiction, and whether the case in the matter of the Declaration and Testimony signers was regularly or irregularly before it, was a subject for it to determine for itself, and no civil court can revise, modify or impair its action in a matter of purely ecclesiastical concern. But in addition to this it has legislative and executive capacity, and acts upon all subjects coming before it, according as they belong to either or each of those departments. It seems that, in conformity with the theory and doctrines of the church, it is the source and fountain of power, and that its authority is neither delegated by nor derived from any human body. The utter impolicy of the civil courts attempting to interfere in determining matters



which have been passed upon in church tribunals, arising out of ecclesiastical concerns, is apparent. It would involve them in difficulties and contentions, and impose upon them duties which are not in harmony with their proper functions. Before a court could give an enlightened judgment it would necessarily have to explore the whole range of the doctrine and discipline of the given church, and survey the vast field of the Divine Word. In matters of litigation where the title to property comes in contest, the rule would be different, as it is the imperative duty of the courts to adjudicate upon the civil rights of all parties. Happily in this country, there is a total disconnection between the church and state, and neither will interfere with the other when acting within their appropriate spheres.

In the case of *Gibson v. Armstrong*, 7 B. Monroe, 481, there was a controversy growing out of the disruption of the Methodist Episcopal Church in 1844; the plaintiff sought to get the church property, on the ground of the unconstitutional division of the church; the defendants relied upon the division for their protection to it. Upon this question the court said: "It is for the authorities of the church in the first instance to judge of an infraction of its laws, and to determine whether the ecclesiastical jurisdiction belonging to any particular body or functionary of the association had been forfeited by such infraction. \* \* \*

The party setting up a claim on the ground of such alleged invalidity should at least plant itself upon some opposing act or judgment of some recognized organ or body in the church having the authority to act or to judge in the premises." Again, the court says: "And the Southern Conferences having, in virtue of these resolutions, erected an extensive ecclesiastical organization, whose rights and jurisdiction are based upon their authority, we are by no means sure that a court of justice, a power outside of the church, has a right to disturb the state of things sanctioned by such evidences of its legality, and by the acts and opinions of the highest tribunals of the church, upon the ground of its own mere opinions that one of these tribunals has violated not the law of the land, but the law or constitution of the church. There would seem to be due from the tribunals of the civil gov-

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ernment to those of the church at least so much respect as to require that the acts done by the latter in the name of the church should be deemed valid under its law, and that the dependent right should be determined accordingly, until those acts were reversed by the church, or at least until they were conclusively demonstrated to be against its law."

The same court in *Shannon v. Frost*, 3 B. Monroe, 261, where a majority of a church had expelled a minority, without charges and without trial, and which also involved their property rights in and to the use of the church edifice, uses the following language: "Whether right or wrong, the act of excommunication must, as to the fact of membership, be law to this court."

In *Robertson v. Bullions*, 9 Barb. 134, the judge, speaking for the court, says: "I do not see how we can look beyond the decision of the synod. All the authorities agree that the civil courts can not upon the merits, overhaul the decisions of ecclesiastical judicatories in matters properly within their province."

In the case of *Harmon v. Dreher* 1 Speer's Eq. 87, it was decided that in this country no ecclesiastical body has any power to enforce its decisions by temporal sanctions; that such decisions are advisory; that they are addressed to the conscience of those who have voluntarily subjected themselves to their civil sway, and except where civil rights are dependent upon them, they can have no influence beyond the tribunal from which they emanated; that a civil court will not look into the regularity of the process by which an ecclesiastical body proceeds to its judgment. Every competent tribunal must of necessity regulate its own formulas.

In *The German Reformed Church v. Siebert*, 3 Barr. 282, it is held that "the decisions of ecclesiastical courts, like every other judicial tribunal, are final; as they are the best judges of what constitutes an offense against the word of God and the discipline of the church. Any other than these courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncer-

tainty and doubt, which would do anything but improve either religion or good morals."

In *Den, etc., v. Pilling et al.*, 4 Zab. 453, it is held that a congregation or inferior ecclesiastical corporation, which by its organization is connected with and subject to the superior jurisdiction of the church to which it belongs, can not, by the act of the corporation or a majority, secede from the denomination, declare themselves independent, and take their corporate property with them. There are many other authorities which might be quoted, affirming and establishing the same doctrines. The power of the General Assembly to issue its deliverances is undoubted, and sanctioned by a long line of precedents. If those deliverances are deemed objectionable by any number of the constituent parts of the church, they may oppose them by lawful means until they obtain their reconsideration or repeal in the body that passed them. If the Congress of the United States or the Legislature of a particular State enacts a law that is distasteful to a minority, the remedy for the minority is not by resisting the law and raising the standard of revolt. Such a course would be destructive of all government, and lead to continual anarchy and revolution. It would destroy that obligatory force and permanency which is the only safeguard for all government, whether human or divine. A law or ordinance regularly passed must be obeyed until annulled or reversed by the superior body intrusted with power in that behalf. The rule is the same in all forms of government, whether instituted for secular or ecclesiastical purposes. The Declaration and Testimony members occupied a subordinate position to the General Assembly, the proceedings of that body were binding upon them, and their recourse was to appeal by all lawful means to the superior judicatory to modify its views, or reverse its action; and, in the event of failure, if they could not conscientiously acquiesce, then, according to the doctrines of the church, they had the privilege of peacefully withdrawing.

But they could not boldly defy the authority of the church, openly secede, and then claim all its rights and privileges. When they entered into the membership of the church they knew the

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State of Missouri ex rel. Watson v. Farris et al.

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extraordinary power which was centered in the General Assembly, and obedience and acquiescence in that power was one of the conditions of membership. They had the right to dissolve that connection, but it was not competent for them to subvert the authority of the majority. But the General Assembly itself has adjudicated upon this subject; that judgment is conclusive upon us. We will not undertake to penetrate the veil of this church power.

The question, then, is as to the right of the defendants to act as trustees for Lindenwood Female College by virtue of their election. It is in evidence that they were elected by a body who had ceased to have any connection with the General Assembly of the Old School Presbyterian Church; that the presbytery whence their title emanated was dissolved in obedience to its orders.

The charter provides that the vacancies shall be filled by the presbytery "which is connected with the General Assembly of the Presbyterian Church in the United States of America, usually styled the 'Old School.'" Such being the case, the body from which the defendants purport to derive their official titles had no power or authority to act in the premises, and the judgment of ouster, rendered in the court below, must be affirmed. The other judges concur.

[END OF OCTOBER TERM.]

CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,  
JANUARY TERM, 1870, AT JEFFERSON CITY.

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JOHN H. & HENRY MOORE, Plaintiffs in Error, *v.* THE MAYOR,  
ALDERMEN AND CITIZENS OF THE CITY OF JEFFERSON, Defendant in Error.

1. *Bonds—Act of March, 1867, authorizing forfeiture of credit, not penal.*—The provision of the act of March 10, 1867, (Sess. Acts 1867, p. 18, § 3,) authorizing the forfeiture of the credit on non-payment of interest on bonds, is not such a penalty as to bring the bonds within the statute pertaining to penal bonds. (Gen. Stat. 1865, ch. 150.)
2. *Bonds—Jefferson City—Receipts of interest after suit commenced not a waiver of right to recover face of bond.*—After commencement of suit on Jefferson City bonds (Sess. Acts 1867, p. 18, § 3) for non-payment of interest due thereon, the mere receipt by plaintiff of said interest without proof of any agreement to discontinue suit or waive the forfeiture, is not a waiver of his right under that statute to recover the whole amount of the bond.
3. *Bonds, forfeiture of—Agreement to waive, effect of.*—*Semble*, that a contract to waive the forfeiture of a bond, although without consideration should be held to have the same force as an act which of itself indicated a waiver, when that contract is an inducement to the performance of the conditions, the neglect of which has caused the forfeiture.

*Error to First District Court.*

*Ewing & Smith*, for plaintiffs in error.

I. The bonds sued on are not penal. (2 Bouv. Law Dic. 323, Penalty; Gen. Stat. 1865, p. 604, § 1 *et seq.*) They are alternative obligations for the direct payment of money. The whole amount of the bond is entirely paid. The bond is in no event to become void, either upon the payment or non-payment of the coupon interest. If there is no penalty there can be no forfeiture, and hence the doctrine in relation to forfeiture and the waivers thereof between landlord and tenant, mortgagor and mortgagee, and obligor and obligee, in penal bonds, can have no application to this case in analogy of fact or law.

II. If by any construction these bonds are deemed penal bonds, then, on the failure to pay coupon interest, the penalty or principal debt became due, and the said corporation could only discharge itself upon payment of principal and interest. (Rosenkrantz v. Durling, 5 Dutch., N. J., 191; Haman v. Dimick, 14 Ind. 105.)

III. When a debt is payable in installments, and it is stipulated that upon the non-payment of any given installment the whole debt is to become due, the tender of the amount due, with costs, after suit, will not save the forfeiture or relieve the obligor from payment of the whole debt. (3 Hurl Norm. 291; 1 Barn. & Ald. 214; 2 Strange, 957; 19 Wend. 104; 7 Paige, 179.)

*Flanagan & King*, for defendant in error.

The acceptance of the interest and costs by plaintiffs amounted to a waiver of the forfeiture. (Conkling v. King, 10 Barb. 372; Chalker v. Chalker, 1 Conn. 79; Garhart v. Finney, 40 Mo. 449.) Payment of interest after suit brought should have the same operation as if paid before. (Coon v. Brickett, 2 N. H. 163; Keenan v. Dubuque Ins. Co., 13 Iowa, 375; Bevin v. Connecticut Mutual Ins. Co., 23 Conn. 244; Bouton v. American Life Ins. Co., 25 Conn. 542.)



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Moore et al. v. The Mayor, etc., of the City of Jefferson.

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BLISS, Judge, delivered the opinion of the court.

The plaintiffs were the holders of twenty-one city bonds, given by defendant, for \$100 each, with interest coupons attached, and conditions that "if the interest is not so paid, this bond becomes due and payable to the holder." Neither of the bonds had become due according to its terms, but the interest was payable annually on the first of July. The coupons maturing in 1868 were presented to the treasurer for payment, which was refused, and this suit is brought for the principal and interest. The defendant answers, among other things, that after the suit was commenced "the defendant, through its treasurer, has tendered to the plaintiffs the sum of \$210, being the amount of interest due upon said bonds, and the further sum of \$12, being the full amount of costs, which amounts the plaintiffs on," etc., "accepted and received in full payment of all coupons up to this date and costs." To this part of the answer there was no reply; but, notwithstanding, judgment upon the bonds was rendered in the Circuit Court, which was reversed on appeal to the District Court.

It is admitted by the record that the plaintiffs received the amount due upon the coupons and costs after the suit was commenced; and the defendant claims this to be a waiver of the breach so that the instrument, according to its terms, can not be enforced. These bonds were issued under a special act (Sess. Acts 1867, p. 18); and section 3 authorizes the conditions of forfeiture of the credit upon non-payment of the interest. The provision in regard to the forfeiture of credit is not such a penalty as to bring the bonds within the statute pertaining to penal bonds. The statute is silent in regard to obligations of this kind, and leaves the parties to their agreements. Does, then, the answer show any such action by the holder as to waive his rights under this provision?

It is clear that if the default of the city was induced by any action of the holder, as by giving further time, or if any sufficient excuse existed for not paying at the time, there would be no default in fact. So it was competent for him to agree to

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waive the default and receive the interest as though paid when due. But the answer simply shows that he accepted payment. I can not see upon what principle that, of itself, as matter of law, can be held to waive his rights. The interest, as well as principal, had become due, and he had a right to receive either as well as both. No agreement is alleged to discontinue the suit or waive the forfeiture, and the defendant was in no way injured or put to disadvantage by the plaintiff's action as set out.

It is very probable that when these coupons and costs were paid there was an understanding that the payment should be received as though made when due, and that the forfeiture should be overlooked. This is a question of fact that should have been put in issue, and then evidence that the plaintiff received the exact amount of the coupons, and all the costs that had then accrued, would be a strong circumstance tending to prove the affirmative of that issue.

The defendant cites many authorities upon the subject of forfeitures and their waiver as of leases, insurance policies, etc., where certain acts are held as matter of law to waive the forfeiture. As, if the landlord, knowing of the forfeiture of the lease, receives after accrued rent, it is an implied acknowledgment of the continuance of the lease, and, of itself, must necessarily be held to waive the forfeiture; so, if an insurer knowingly issues a policy and receives a premium, without the performance of some condition required of the assured, he is held to have waived the condition. And, in the present case, if anything had been done by the holder of the bonds inconsistent with any other hypothesis than that the long credit still existed, that act would of itself have been an acknowledgment of the continued credit. No such act is set up in the answer, and an agreement should have been alleged. It is true that an agreement without a consideration can not, in general, be enforced; yet the law does not favor forfeitures, and equity, it is said, abhors them. A contract to waive it should be held to have the same force as an act which of itself indicated a waiver, where that contract is an inducement to the performance of the conditions, the neglect of which had caused the forfeiture.

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Moore v. White.

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That the case may go back to the Circuit Court for a new trial upon an amended answer, we affirm the judgment of reversal and remand the cause, with leave to amend. The other judges concur.

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J. H. MOORE, Plaintiff in Error, v. J. L. WHITE, Defendant in Error.

1. *Damages — Trespass — Fence, sufficiency of.*—The fence inclosing the land of A. was built within the boundary line of the land of B. In trespass for damages done to A.'s crop by cattle of B.: *held*, that the land was inclosed as required by law (Gen. Stat. 1865, ch. 80, §§ 1, 2) as a condition to recovery. If the fence was of the required character and dimensions, and was treated and used as a partition fence that was sufficient without regard to its ownership.
2. *Damages — Trespass — Fence — Proof — Common and statute law.*—In an action of trespass for breaking through plaintiff's fence, he may sue for single damages at common law. He must comply with the statute (Gen. Stat. 1865, ch. 80) by showing, as a condition to his right of recovery, that his field was inclosed by such a fence as the law defines. But the mode of proof is not modified or affected by the statute.

*Error to First District Court.*

*Stephens & Dryden*, and *White*, for plaintiff in error.

*Draffin & Muir*, for defendant in error.

CURRIER, Judge, delivered the opinion of the court.

The parties to this suit were occupants of adjoining lands—their respective fields being separated by a fence. A considerable number of the defendant's domestic animals broke through this fence and into the plaintiff's adjoining field and injured his crops. This suit is brought to recover the consequent damages. The only questions for consideration relate to the legal sufficiency of the fence, and the right of the plaintiff to the enjoyment of its benefits.

The case shows that the fence was constructed some eighteen years since by the then proprietor of the farm now occupied by the defendant. The farm was subsequently purchased by one Gibson, who died some years ago, but the farm still constitutes

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Moore v. White.

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a part of his estate. Prior to his death, and by his permission, the plaintiff connected the fence inclosing his own lot, with Gibson's fence, so that Gibson's fence bounded and protected the plaintiff's field on the side adjoining Gibson's land. A late survey discloses the fact that the fence was some three feet on Gibson's land from the true line dividing the lands of the adjoining proprietors. The plaintiff had no other fence on that side to protect his field.

The defendant insists, for substance, that the fence being on Gibson's land, and owned by him, it was not a division or partition fence, and deduces the conclusion that the plaintiff's field was not inclosed, as the law requires as a condition to his recovery for the trespass complained of. We do not take that view of the subject. The statute (Gen. Stat. 1865, §§ 1, 2) simply declares that "all fields and inclosures shall be inclosed" by a fence of a given description, without going into the question of the proprietorship of the inclosing fence. It is the existence of the required fence as a fact that the statute demands. It says nothing about who shall erect, preserve, or own it. It was not until 1869 that the Legislature addressed itself to these topics. (Wagner's Stat. ch. 57.) The plaintiff's field was in fact inclosed, and, if by a fence of the required character and dimensions, that was sufficient so long as the fence remained. Had Gibson or the succeeding occupant suffered the fence to go to decay, or had it removed, the case would have presented a different aspect. It did not go to decay and was not removed, but remained, and for all practical purposes constituted a partition fence between the adjoining owners. No one had ever objected to its being so treated and considered. We think, therefore, that the court was warranted in directing the jury that the plaintiff was entitled to recover, so far as this point was concerned, if they found from the evidence that the fence in question was treated and used as a partition fence by the adjoining occupants.

But the defendant further insists that the only mode of establishing the legal sufficiency of the fence was by pursuing the steps pointed out in the statute. (Gen. Stat. 1865, p. 385, §§ 3, 5.)

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If this suit were founded on the statute, there would be force in this position. But it is not so founded. The plaintiff is simply pursuing a right at common law by a common-law remedy. It is not a suit to recover the double damages provided by statute, or any statutory penalty. The only bearing the statute (Gen. Stat. 1865, ch. 80) has on the case is that it, according to the construction placed thereon (*Gorman v. Pacific R.R.*, 26 Mo. 441), imposes on the plaintiff the duty of showing, as a condition to his right of recovery, that his field was inclosed by such a fence as the law defines. The right the plaintiff is seeking to vindicate is a right at common law, and not a right accruing to him under and by virtue of the statute. The statute, instead of originating the right, throws obstacles in the way of its assertion. At common law, it was the duty of the owner of animals to restrain and keep them on their own premises, and not of land proprietors to fence against them. (3 Kent's Com. 558, 11th edition.)

A statute of New York provided a summary remedy for this class of trespasses, by calling out the fence viewers, and having the damages assessed by them; but that statute is not construed as taking away any previously existing common-law right or remedy. When a statute creates a right which did not previously exist, and prescribes a remedy for its violation, that remedy is to be pursued. (*Stafford v. Ingersol*, 3 Hill, 38.) But, as already observed, the plaintiff is not asserting any right or remedy existing under or created by the statute. He is asserting a common-law right through a common-law instrumentality. In order to the achievement of success, however, the statute makes it necessary for him to prove a fact, which, but for the statute, it would not be necessary to prove, namely: that his field was inclosed by a fence of a defined character. The mode of proof is not modified or affected. If the plaintiff were seeking to recover the double damages given by statute, then, doubtless, it would have been necessary to his success that he should have pursued the steps, and made his proofs in the mode which the statute prescribes in such cases. But the plaintiff is claiming no double damages, but only the damages recoverable at common law.

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By one of the instructions given for the plaintiff it was made necessary, in order to a verdict in his favor, that the jury should find that the defendant's trespassing animals were "breachy." This is criticised, but it is not perceived that it could possibly have prejudiced the defendant. It was requiring the jury to find a fact in no way material to the case, and which unnecessarily embarrassed the plaintiff's side of it.

In regard to the dimensions of the fence—its legal sufficiency—the evidence was conflicting. Under the instructions of the court, the jury found on this point for the plaintiff and the instruction, so far as it relates to this particular matter, is not complained of, common-law proofs being received as evidence of the facts.

The judgment of the District Court is reversed, and that of the Circuit Court affirmed. The other judges concur.

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CORDELIA A. HINDS, Plaintiff in Error, *v.* RHODA STEVENS *et al.*,  
Defendants in Error.

1. *Partition—Wife of coparcener can not be party.*—It is unnecessary to make the wife of a person interested in the partition of lands a party to a proceeding for partition therein. (Lee v. Lindell, 22 Mo. 202.) If the land be divided in specie, her inchoate right attaches at once to her husband's share. If it be sold, she has no claim to any portion of the proceeds
2. *Dower—Act of 1855 touching partition—Death of husband after judgment and before sale.*—Under the act of 1855, touching partition (R. C. 1855, ch. 119), the judgment of sale was the final action of the court, and the wife of a coparcener, becoming a widow after judgment and before the sale, can not be made a party and have her interest ascertained by the court. She must look to the sheriff for her portion of the proceeds of the sale.

*Error to First District Court.*

*Ewing, and Smith, for plaintiff in error.*

Sale of land in partition unquestionably divests the inchoate dower of the wife. (Lee v. Lindell, 22 Mo. 202; Jackson v. Edwards, 22 Wend. 498.) If the sale takes place after the



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husband's death, she would have the same interest in the money as though it were received by her husband while living. Her interest in the money would attach at his death, just as that right or interest would attach to the parcel of land were it assigned him in the partition.

*Lay & Belch*, for defendants in error.

Plaintiff's right of dower having attached before the sale of the land to which this right attached, it could not be divested without a voluntary relinquishment by her, or by a court having jurisdiction over her and the subject-matter. She must have been a party. (R. C. 1855, ch. 119, §§ 3, 4; Sto. Eq. 629-30; *Lee v. Lindell*, 22 Mo. 202.) The case of *Lee v. Lindell* does not go so far as to decide that when the husband died seized the dower was divested by subsequent sale.

BLISS, Judge, delivered the opinion of the court.

In 1859, the husband of plaintiff, and others, filed their petition for partition in the lands belonging to their father's estate, and after the usual order of partition and report of commissioner that the property could not be divided without great prejudice, etc., at the October term, 1862, final judgment was rendered that the lands be sold, and the proceeds divided. After the judgment and before the sale, the husband of plaintiff dies, and the record does not show what was done with the proceeds of the sale. The present plaintiff now comes into court and presents her petition for dower in her said husband's interest, in the lands so ordered to be sold, and claims that inasmuch as she was not a party to the original proceeding, and especially as the property was not sold until after her husband's decease, her claim is not barred.

Since the decision of this court in *Lee v. Lindell*, 22 Mo. 202, it has never been deemed necessary to make the wife of a person interested in the partition of lands a party to a proceeding for partition. The statute does not expressly require it, and I can not conceive of any interest she can have in the result more than in any other suit touching the realty. If the land be divided in specie, her inchoate right attaches at once to the land thus set

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apart to the husband in severalty; and if it be sold, I know not how it would be possible to so estimate the value of that shadowy right, as to pay her, or invest for her, any portion of the proceeds of the sale. The very broad language in relation to parties to proceedings in partition was substantially the same in the statute of 1835, under which *Lee v. Lindell* was decided, as in that of 1855, covering the proceedings in question. Too many titles would be affected to permit any change now in the ruling upon that subject, even if we were not satisfied with its original correctness.

The only question, then, open to consideration pertains to the effect of the sale after the death of the co-parcener. This proceeding in partition was had under the act of 1855, and by that act the order or judgment of sale was the final judgment in the premises. No report by the sheriff was required, and he could make distribution of the proceeds upon his own responsibility. This court, in *Durham v. Darby, adm'r, etc.*, 34 Mo. 447, intimates a general power of control by the court over the execution of the order, but distinctly holds, as bound to do by that statute, that the judgment of sale was the final action by the court. The present law (*Wagner's Stat.* 972, §§ 38, 39) expressly requires the sheriff to "report his proceedings to the court," and that distribution be made by judgment—a change intended both to protect the sheriff and any rights that may have intervened since the former proceedings.

The order of sale being the final judgment, and disposing of the whole matter so far as that case is concerned, I know of no way in which the widow, becoming such after judgment, could be made a party. Upon the death of the husband, her interests and consequent rights become clear and specific; and if the case were still in court, she should be made a party, that that interest might be ascertained and those rights protected in the pending suit. But the case having, under that statute, gone out of court, she can not be made a party, and must look to the sheriff for her portion of the proceeds of the sale. This record shows nothing in relation to the sheriff's action, but it must be presumed that he did his duty and paid her all she was entitled to, and this court can not give her more.

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The record is grossly imperfect. We have indicated the principles that ought to govern the case, but we can not affirm the judgment of the Circuit Court, for the record does not show any regular judgment.

The judgment of reversal by the District Court is affirmed, and the case remanded to the Circuit Court for further action in accordance with this opinion. The other judges concur.

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THE PACIFIC RAILROAD COMPANY, Plaintiff in Error, v. JOHN S. SEELY *et al.*, Defendants in Error.

1. *Corporation — Railroads — Agreement to locate depot in consideration of donation of lands, void when.*—A. agreed with the Pacific Railroad Company to deed it a certain lot of ground for purposes of speculation in consideration that the company would locate a freight and passenger depot on his land. There was no evidence that the land was to be used for the general business of locating, constructing, managing, and using the road. *Held*, that although in one sense the company was a private corporation, yet its chartered privileges were granted, in part, to subserve great public interests; that such an agreement might be superinduced by prospects of mere gain, and thus the general welfare and good of the public might be sacrificed to subserve mere private interest; that for this reason such an agreement was void against public policy.
2. *Corporations — Railroad — Power to hold land, governed by its charter.*—The charter of the Pacific Railroad Company gave it power to acquire a strip of land not exceeding one hundred feet wide for a right of way, and to hold sufficient ground for the erection and maintenance of depots, landing places, etc. *Held*, that the corporation had no power to acquire land for purposes of speculation. A corporation can purchase and hold land only for such purposes as are authorized by its charter.

*Error to First District Court.*

*Whittelsey*, for plaintiff in error.

I. The contract between the parties to the instrument for the depot ground and reservoir was a valid contract, and has not been complied with. (Sess. Acts 1849, p. 219, §§ 7, 8, 10; Sess. Acts 1851, p. 268, § 9; R. C. 1855, § 1, subd. 4, §§ 13-22, 27, 29, subds. 2, 3.)

II. The Pacific railroad had authority to locate its stations where it deemed best for itself, and to contract for such location. Railroads are private corporations for private profit. (*Bissell v. M. S. & N. I. R.R.*, 22 N. Y. 258, 287; Sess. Acts 1849, charter, §§ 7, 8, 13; 1 Redf. on Railw. 53, 54, notes 6, 7; *Taylor v. Cedar Rapids & St. P. R.R.*, 25 Iowa, 371; *Chapman v. Mad River R.R. et al.*, 6 Ohio St. 119.)

III. The company had the power to contract for the lands, both at common law and under the statutes. (Ang. & A. on Corp. §§ 145, 151, 110, 153; *Bank v. Niles*, 1 Doug., Mich., 401, 403; *Page v. Heineberg*, 40 Verm. 81; 2 Blackst. Com. 475; 2 Kent's Com. 27, 77.) The agreement was not void on grounds of public policy. (*Racine County Bank v. Ayers*, 12 Wis. 512; *Cumberland Valley R.R. v. Baal*, 9 Watts, Penn., 458.) Subscriptions on condition of locating lines or stations are valid, deciding against the New York cases. (*Pierce*, Am. R.R. L., 70, 71; *Chamberlain v. Painesville, etc., R.R.*, 15 Ohio St. 225, 247, affirming 6 Ohio St. 119; *Ashtabula & N. L. R.R. v. Smith*, 15 Ohio St. 328; *Henderson & N. R.R. v. Leavell*, 16 B. Monr. 358, 364; *McMillan v. Maysville & S. RR.*, 15 B. Monr. 218; *Carlisle v. Terre Haute & Ind. R.R.*, 6 Ind. 316; *Fisher v. Evansville & I. R.R.*, 7 Ind. 407; *Troy & G. R.R. v. Newton*, 1 Gray, 544; *N. H. C. R.R. v. Johnson*, 10 Foster, N. H., 390, 401; *North Mo. R.R. v. Winkle*, 29 Mo. 318; *Miller v. Pittsburg, etc., R.R.*, 40 Penn. 237; *O'Neal v. King*, 3 Jones, N. C., 517; *Kennett v. Plummer*, 28 Mo. 142; *State v. Hann. & St. Jo. R.R.*, 37 Mo. 265; 10 U. S. Stat. 802; Sess. Acts 1852-3, p. 10, § 5; R. C. 1855, p. 425, § 29, *e, d*, 2 and 3; *State v. Bailey*, 16 Ind. 46; *Junction R.R. Co. v. Reeve*, 15 Ind. 236; *Taylor v. Cedar Rapids & St. P. R.R.*, 25 Iowa, 371; *Chapman v. Mad River, etc., R.R.*, 6 Ohio St. 119.)

*Draffin & Muir*, for defendants in error.

I. The contract sued on is void, as being against public policy. (*Fuller v. Dame*, 18 Pick. 479; *Gray v. Hook*, 4 Comst. 456; *Davison v. Seymour*, 1 Bosw. 89; *Rose v. Truax*, 21 Barb. 361, 372, 374.)

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II. The plaintiff, under its charter, has no power to engage in town speculations; no power to purchase lands for villages and towns, either to rent or sell. (Act of Incorporation, 1849, p. 219, §§ 1, 7, 20, and amendatory act, 1851, § 9, p. 272; R. C. 1855, § 1, 4th subd., p. 406, vol. 1; authorities hereafter cited.)

III. The petition is multifarious. (40 Mo. 482; 26 Mo. 72.)

IV. As the suit is founded on a written contract, the same should have been filed with the petition. (Gen. Stat. 1865, ch. 165, § 50; Dyer v. Murdock, 38 Mo. 226.)

WAGNER, Judge, delivered the opinion of the court.

This was a suit instituted in the Circuit Court of Moniteau county, praying for a specific performance. It appears from the record that one William T. Seely, in his lifetime and on the 21st day of December, 1857, made and executed a contract in writing with plaintiff, which contained an obligation that, in consideration that plaintiff would locate a freight and passenger station on the land of said Seely, he would, in addition to the land already given, convey to the railroad, whenever called upon, four acres of land, for freight and passenger stations.

He further agreed, by said contract, to lay off into town lots one hundred and sixty acres, in such manner as the engineer of the plaintiff might direct, and make a deed to an undivided fourth part thereof to such persons as the directors of the plaintiff should designate. Seely made a plat of the town, showing the streets and alleys and railroad grounds, and placed the same on the records of the county. Afterward, in the year 1863, Seely died, and the plaintiff, in 1868, commenced this suit against his heirs and administrators. The petition averred that plaintiff had fully complied on its part with all the acts which constituted the consideration.

To this petition the defendant interposed a demurrer, and assigned the following grounds of objection: 1st. Because the petition does not state facts sufficient in law to constitute a cause of action, in this: the corporation or plaintiff, in the construction of the road and in the location of its depots and passenger stations, acted in the capacity of commissioners representing, in

part, the community or public, and could not by contract, bind itself to locate a depot at any particular place. Such an agreement is against public policy and *nudum pactum*, and can not be enforced. 2d. Because the plaintiff had no power under its charter to make the contract sued on; it would have no right to engage in town speculations in the purchase of lands and holding them for villages and towns, either to rent or sell. The contract is therefore void. The third ground taken by the demurrer was that the petition was multifarious, and the fourth objection was that the written contract was not filed with the petition. The demurrer was sustained in the Circuit Court, and no answer being filed, judgment absolute was rendered in favor of the defendants. This judgment was affirmed in the District Court, and the case is here for revision on error.

The first two assignments set forth in the demurrer constitute the essential merits of the case, and will be alone considered. There are certain contracts which corporations can not make, which it would be perfectly competent for individuals to execute. The charter of corporations constitutes the chart of their authority, and they have no powers except such as are expressly granted, and such as are auxiliary or necessary to carry out and subserve the object of their creation.

The act incorporating the Pacific railroad defines its powers and specifies the objects for which it was created. The seventh section of the act incorporating the company provides that said company shall have full power to survey, mark, locate, and construct a railroad from the city of St. Louis to the city of Jefferson, and thence to some point in the western line of Van Buren county (afterwards changed to Cass county), in this State, with a view that the same may be hereafter continued westwardly to the Pacific Ocean; and for that purpose may hold a strip of land not exceeding one hundred feet wide, and may also hold sufficient land for the construction of depots, warehouses, and water stations; and may select such route as may be deemed most advantageous, and may extend branch railroads to any point in any of the counties in which said road may be located. (Sess. Acts 1849, p. 220, § 7.)



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In 1851, section 7, *supra*, was amended so as to give the company authority to locate and construct the road on any route which it might deem most advantageous, to any point on the western line of this State which it might select; and the power was also conferred to hold a strip of land not exceeding one hundred feet wide, except where it was necessary for turn-outs, embankments, or excavations; in which case it was authorized to hold a sufficient width for the preservation of the road; and it was further empowered to hold sufficient land for the erection and maintenance of depots, landing places or wharves, engine houses, offices, machine shops, warehouses, and wood and water stations. (Sess. Acts 1851, p. 272, § 10.) Section 20 of the original charter declares that the operations of the company shall be confined to the general business of locating, constructing, managing, and using said railroad, and the acts proper to carry the same into complete and successful operation.

The above sections designate the general objects of the road, and comprise its whole power in relation to obtaining and holding real estate. In regard to the first question presented by the record, there have been differences of opinion in the courts, and the authorities are admittedly diverse. The case of Taylor v. Cedar Rapids, etc., R.R. Co., 25 Iowa, 371, so strongly relied upon by the counsel for the plaintiff in error to show that a contract for the location of a depot or station-house at a particular place is valid, is hardly an authority for the position he assumes. There the grantor had conveyed the right of way to a railroad company upon the condition that the depot of the company should be located within a certain distance of a particular place. The grantor did not surrender the land, and the railroad failed to comply with the stipulations, and located the depot at another and different place. The court held that a breach of the condition defeated the estate conveyed by deed, and that the vendor, not having surrendered the possession of the land, might enforce the forfeiture and have his damages for the right of way assessed as though no deed had ever been made. No question was raised as to whether the deed was valid or invalid on the grounds of public policy. The grantor was the only person who could have

raised that question, and he did not seek to avail himself of it. He had willingly parted with his estate upon an agreed condition, and when the other party violated the condition the court said that he was entitled to damages for his right of way.

Many cases have been cited to show that subscriptions of stock to railway companies, conditional on the location of the line or station, would be upheld. Although this is denied by the courts in New York, yet it is the general doctrine. (*Racine County Bank v. Ayers*, 12 Wis. 512; *McMillen v. Maysville & Lexington R.R. Co.*, 15 B. Monr. 218; *Henderson, etc., v. Leavell*, 16 B. Monr. 358; *Carlisle v. Terre Haute & Ind. R.R.*, 6 Ind. 316; *Fisher v. Evansville, etc., R.R. Co.*, 7 Ind. 407; *Cumberland R.R. Co. v. Baab*, 9 Watts, 458; *Rhey v. Ebensburg Plank R. Co.*, 27 Penn. St. 261; *Central Turnpike Corp. v. Valentine*, 18 Pick. 142; *Troy, etc., v. Newton*, 1 Gray, 544; *Chapman v. Mad River, etc., R.R. Co.*, 6 Ohio. St. 119.) Such subscriptions are upheld on the ground that the agreement, and not the stock itself, is conditional. The parties subscribing are not considered stockholders until the company has performed the condition on which the undertaking depends; and when that is done, they become stockholders by force of the agreement of the parties, and the subscription becomes absolute. Of this character are the subscriptions made by counties and townships as well as individuals, providing that the road shall be located upon a prescribed line. But the conveyance proposed and sought to be enforced in this case was not in the nature of a stock subscription. Stock is subscribed and used by the company for the purposes of construction and equipment, and carrying out its legitimate pursuits. The subscribers become shareholders, and are entitled to a voice in the management of the company. But Seely did not offer to subscribe or become a shareholder. He proposed to deed the company a lot of land for speculative purposes in consideration that it would do a certain thing. There is no evidence that the land was to be used for the general business of locating, constructing, managing and using the road. But the broad position is taken that the company is a private corporation, and has the right to buy and hold all kinds of property the same as an indi-

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vidual. This position is wholly indefensible. Whilst it is true, in one sense, that it is a private corporation, yet the public is deeply interested in it. Its chartered privileges and franchises were not granted solely and exclusively for private benefit and emolument, but to subserve a great public interest.

In *Walther v. Warner*, 25 Mo. 277, this court decided that the building of a railroad by a private corporation, under the authority of the Legislature, for the public accommodation was a public use for which private property might be lawfully taken. In all these enterprises there is a mingling of both public and private benefit, and the interests of the public are not to be sacrificed to mere private gain.

In the case of *Fuller v. Dame*, 18 Pick. 472, the action was on an agreement made in consideration of certain services in procuring the location of a depot at a certain place. It was a contract entered into between D. and F. and recited that D. was the owner of land which would be enhanced in value if the Boston & Worcester Railroad corporation should establish their depot on certain flats; and that, in order to procure the corporation to make such location of the depot, it would be necessary to form a joint-stock company to purchase the flats and give a portion thereof to the railroad corporation for the depot, and that F. had agreed to aid in getting up such a company, and in causing the railroad company to fix its depot on the flats, it being understood that he was of the opinion that the railroad corporation, with a view to the public good and the interests of the stockholders, ought to have its depot there; and D. agreed to make F. a pecuniary compensation so soon as the depot should be located on the place specified. A company was accordingly formed and incorporated, with power to purchase and hold the flats and to give a portion thereof to the railroad corporation as an inducement to establish the depot thereon, and an agreement was made between the two corporations by which the depot was located on the flats. F. was a member of the railroad corporation at the time when he made the agreement with D.; and subsequently became a member of the joint-stock company.

Although the court had previously sustained conditional sub-

scriptions to stock, as heretofore noted, yet they held that this agreement was contrary to public policy and to open, upright, and fair dealing, because it tended injuriously to affect the public interest in having the fittest location of the depot and the interests of the two corporations, and consequently it was invalid.

Shaw, C. J., speaking for the whole court, gave the subject the following lucid exposition: "The case in question is, we think, clearly within the operation of this salutary principle. Without considering other aspects of the contract, we are of opinion that it was contrary to public policy and to upright and fair dealing, as it tended injuriously to affect the public interest in establishing the fittest and most suitable location for the termination of the Worcester railroad, for the accommodation of public travel; 2. As it affects the interests of the proprietors of the Worcester railroad; 3. As it affected the interests of the joint-stock company incorporated under the name of the South Cove Corporation. The Boston & Worcester railroad was established for the public accommodation and convenience in the transportation of passengers and merchandise. Like a country road, it was in many respects a common highway. It has been so held in case of turnpike roads. (*Commonwealth v. Wilkinson*, 16 Pick. 175.) It may be said that it was to be constructed and located by the corporation. True, as in the case of a turnpike road, it is constructed in the first instance at the expense of a private company of adventurers, under the sanction of the Legislature, incorporated for that express purpose, and they are to be reimbursed by a toll levied and regulated by law for their remuneration. The work is not the less a public work, and the public accommodation is the ultimate object. It is also true that it was left to the corporation and directors to fix the termination and place of deposit. In doing this, a confidence was reposed in them, acting as agents for the public—a confidence which it seems could be safely so reposed, when it is considered that the interests of the corporation as a company of passenger and freight carriers for profit was identical with the interests of those who were to be carried and had goods to be carried—that is, with the public interest. This confidence, however, could only be safely

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so reposed under the belief that all the directors and members of the company should exercise their best and their unbiased judgment upon the question of such fitness without being influenced by distinct and extraneous interests, having no connection with the accommodation of the public or the interests of the company. Any attempt, therefore, to create and bring into efficient operation such undue influence has all the injurious effects of a fraud upon the public, by causing a question which ought to be decided with a sole and single regard to public interests to be affected and controlled by considerations having no regard to such interests."

The agreement in this case was to give the company an interest in town lots, provided it would locate its station at a certain specified place. It is easy to perceive how such a transaction might be perverted so as to operate most injuriously to the public. Speculators and landed proprietors, for the purpose of enhancing their property, would always be on hand to obtain locations, and forcing people to their premises, regardless of the consideration whether they were the most fit and convenient; and the companies, tempted by the prospect of gain, would accede to these propositions, and thus the general welfare and good of the public would be sacrificed to subserve mere private interests. Whilst conditional subscriptions to stock may be entirely valid, I do not think agreements of this character should be upheld.

The next question is, whether it was competent for the railroad company to hold these lots under its charter. "A corporation," says Chief Justice Marshal, "being the mere creature of law, possesses only those properties which the charter of its corporation confers upon it, either expressly or as incidental to its very existence." (*Dartmouth College v. Woodward*, 4 Wheat. 518.)

The same doctrine is reiterated by McLean, J., in *Beatty v. Knowler*, 4 Pet. 152, and is, in effect, laid down by all the elementary writers, and contained in all the American cases upon the subject. (*Blair v. Perpetual Ins. Co.*, 10 Mo. 559; *Merchants' Bank v. Harrison*, 39 Mo. 433; *Hoagland v. Hann. & St. Jo. R.R. Co.*, 39 Mo. 451; *City of St. Joseph v. Saville*, *id.* 460; *Chautauque Co. Bank v. Risley*, 4 Den. 485; *State v. Mansfield*, 3 Zab. 510; *State v. Newark*, 1 Dutch. 315.) The



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corporation, then, can purchase and hold land only for such purposes as are authorized by its charter.

The act of incorporation gave the plaintiff power to acquire a strip of land, not exceeding one hundred feet wide, for a right of way, and to hold sufficient ground for the erection and maintenance of depots, landing places or wharves, engine-houses, offices, machine shops, and wood and water stations; but it conferred upon it no authority to become a real estate broker or speculator in town-lots. I think the contract, so far as it proposed to invest the company with the title to the lots, was utterly void.

Something has been said concerning the lot of land on which the depot and station are situated, but that requires no particular discussion. On the plat it was dedicated for that specific purpose; the company has been in quiet and peaceable possession for nearly ten years, and so far there has been no effort to molest its possession. When an attempt is made to interrupt the enjoyment, it will then be time enough to consider the matter.

In my opinion, the judgment should be affirmed. Affirmed.

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MARTHA G. BROWN, Adm'x of the Estate of GEO. W. BROWN, deceased, Defendant in Error, v. RAILWAY PASSENGER ASSURANCE COMPANY, Plaintiff in Error.

1. *Agency—Skill and discretion—Agency not delegated.*—It is a settled principle in the law of agency that where an authority is conferred requiring skill or discretion on the part of an agent, and no power of substitution is given, then the agent must act in person, and the principal would not be bound by any act of a sub-agent. But this doctrine has no application to the responsibility of an accident insurance company for acts of its sub-agents.
2. *Damages—Railroads—Accident policies—General accident tickets—Vexatious delay.*—An engineer killed on a railroad locomotive had previously purchased a ticket issued by the Railway Passenger Assurance Company, which, by its terms, insured against death "caused by accident while traveling by public or private conveyance provided for the transportation of passengers." Suit being brought by his legal representatives on the policy, the proof showed that defendants were selling two classes of tickets, one



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known as the "travelers' risk," the other as the "general accident;" the latter being sold for the highest price; that deceased purchased the latter; that at the time of the purchase defendant's agent knew him to be an engineer, and had no instructions not to sell to railroad employees. *Held*, that deceased was insured against all accidents, without regard to the capacity in which he was acting; that the ticket was intended to cover the accident by which he met his death; and that defendant was liable. *Held, also*, that it was the duty of defendant to pay upon notification of the death of deceased, and, on its refusal to comply, interest was thenceforth payable.

3. *Insurance, accident, contract of—Stipulations, how construed.*—In a contract of insurance containing mutual stipulations, each stipulation is to be construed favorably to the party entitled to claim its benefit.
4. *Insurance companies—Vexatious refusal, etc.—Damages determined by the jury.*—In actions against insurance companies under Gen. Stat. 1865, ch. 90, § 1, the whole question of vexatious refusal or delay in payment, is to be determined by the jury. But before damages are allowed it need not be explicitly proved by plaintiff that the delay or refusal was vexatious. If upon a full consideration of all the facts and circumstances, they conclude that the refusal was unjustifiable and vexatious, the law authorizes them to assess the damages.

*Error to First District Court.*

*Edwards & Son*, for plaintiff in error.

I. There is no proof that Brown was a passenger at the time he was killed, or that he was traveling on any conveyance of the kind described in the petition.

II. The question of vexatious refusal to pay, is a question of fact; and it was error in the court to instruct the jury that they had power to allow the plaintiff damages not exceeding ten per cent., in the absence of proof that the refusal to pay was vexatious. (23 Mo. 520-522; 36 Mo. 521; Gen. Stat. 1865, ch. 90, § 1.)

III. Miller, the agent of the defendant, had no right to delegate his authority to sell tickets to Church. Defendant is not liable for any ticket sold by Church, or any one else deriving his authority to sell from Miller. (Story on Agency, § 13; Bac. Abr., title "Authority," letter D, vol. 1; 2 Kent, 633.)

IV. Unless Brown was a passenger on a conveyance, public or private, provided for the transportation of passengers, at the time he was killed, his policy did not cover the risk, and the defendant is not liable. (36 Mo. 435; 3 Kent's Com. 312, 318.)

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*Ewing & Smith*, for defendant in error.

I. Church was a sub-agent of defendant, employed by the agent Miller to transact and perform an act for the defendant that required no personal skill or discretion, and an act which, by implication and the ordinary course of business, the agent was justified and authorized to employ a sub-agent to perform. (Story on Agency, §§ 14, 201, 217, 391, 393, and authorities cited; 1 Pars. on Cont. 82, latter part note *p.*; *Mason v. Joseph*, 1 Smith's Eng. 406; *Powell v. Tuttle*, 3 Comst. 396; *Williams v. Woods*, 16 Md. 220.)

II. The sale of the policy was the act of the agent Miller, and for which he was directly liable to his principal, the defendant. (Story on Agency, §§ 160, 161, and authorities cited.) By the statute, Church was, to all intents and purposes, the agent of defendant. (Gen. Stat. 1865, p. 403, § 5.)

III. A locomotive engine which transports a train of passenger coaches or cars, is eminently a "conveyance used for the transportation of passengers." As well might it be said that the keel of a steamer was not a conveyance for the transportation of passengers, and that a passenger who was in the hold of a boat when the accident occurred, could not recover his insurance.

IV. Brown's ticket was a "general accident ticket," for which he paid the highest price.

WAGNER, Judge, delivered the opinion of the court.

Although several questions have been discussed in the argument of this case, there is really but one requiring any particular consideration. The action was to recover the sum of \$5,000, the amount of a policy issued by the defendant, insuring the plaintiff's intestate against death by accident for the period of thirty days.

The ticket covering the insurance policy was in these words: "The Railway Passenger Assurance Company of Hartford, Conn., will pay the owner of this ticket twenty-five dollars per week in case of personal injury causing total disability, for a period not exceeding twenty-six weeks, or the sum of five thou-

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sand dollars to his legal representatives, in the event of his death, from personal injury, ensuing within three months from the happening thereof, when caused by any accident while traveling by public or private conveyance, provided for the transportation of passengers in the United States or British North American possessions, it being understood that this policy covers no description of war risk."

Miller was the agent of the defendants for the sale of tickets; and the ticket was purchased by Brown, the deceased, of Church, the clerk of Miller, who transacted his business and sold most of the tickets. Brown, at the time of purchasing the ticket, was an engineer on the Pacific Railroad, engaged in running trains west of Jefferson City, and, in a short time after the purchase of the ticket, and within the time covered by the policy, he was killed, when so engaged, by an accident occurring on the road.

It is in evidence that, when the ticket was sold, defendant's agent knew that Brown was an engineer; and Miller testifies that he had no instructions not to sell to employees of the railroad till after Brown's death. It is also shown by the evidence that the company had, and sold, two classes of tickets. The one was known as the "traveler's risk," the other was the "general accident." The latter was the highest price. The ticket sold Brown was the "general accident," for which he paid the highest price. Upon these facts plaintiff had judgment in both courts below.

The first ground insisted on by the counsel for the plaintiff in error is that the contract and sale was void, because Miller was the agent of the company, and he had no authority or right to delegate the power to Church to sell; that Church was not known to the defendant, and it was, consequently, not bound by his acts. It is without doubt a settled principle in the law of agency that where an authority is conferred requiring skill or discretion on the part of an agent, and no power of substitution is given, there the agent must act in person, and the principal would not be bound by any act of a sub-agent. But it is not perceived that the doctrine has any application to this case. These tickets insuring against accidents are made out and signed at the com-

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pany's principal office, and transmitted to their various agencies, to be sold indifferently to all who apply for them. The agent does nothing more than deliver them to the applicant and receive pay for them. The person buying them takes them subject to the printed conditions, and, if he violates the conditions, he incurs the hazard of losing all the benefits. As well might it be said that if certain articles of merchandise were deposited with a merchant for sale, the merchant's clerks would be incompetent to sell. It would indeed be monstrous to allow these insurance companies to go on and sell tickets and receive all the profits accruing therefrom, and then, when an accident occurred, to shield themselves from liability upon such a pretext. But the main point in the case is whether the plaintiff's intestate, Brown, was killed by an accident which is covered by the policy. The clause insuring him provides that the death must be "caused by an accident while traveling by public or private conveyance provided for the transportation of passengers."

It is strongly contended that a locomotive or engine is not a conveyance provided for the transportation of passengers. This is certainly true, and if the ticket applies solely and exclusively to passengers or travelers, the position that the company is not liable can not be controverted. A passenger would have no right to go upon an engine, and if he was so indiscreet as to venture on such a place, and injury ensued, he would not be protected. But this ticket was designed to include and cover something more than the ordinary risk incurred by the passenger or traveler. The locomotive is a necessary part of the conveyance. The ticket was a general accident, as contradistinguished from a mere passenger or traveling, ticket. The premium on one is double what it is on the other. When the ticket was sold it was known that Brown was an engineer, and the conclusion is unquestioned that he believed that he was insured while pursuing his employment or occupation. The company so thought, for it gave no instructions against insuring railroad employees till after the disastrous accident happened.

Dr. Paley, in commenting on the rule in relation to the construction and performance of contracts, says: "Where the terms

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of a promise admit of more senses than one, the promise is to be performed in that sense in which the promisor apprehended at the time the promisee received it." (Paley's Moral and Polit. Phil. 104.) The consequence of the application of this rule to a contract of insurance containing mutual stipulations is that each stipulation is to be construed favorably to the party entitled to claim its benefit, since it is always a reasonable presumption not only that it was understood by him in its largest sense, but that this was the sense in which the opposite party meant he should receive it.

Mr. Duer, in his admirable treatise on marine insurance, in speaking of the interpretation that should be given to policies (and I know of no reason why the same rule should not be applied here) says: "As a contract of indemnity to the assured, the policy is to be liberally construed in his favor, not only because this mode of construction is most conducive to the interests of commerce, but because, for the reasons that have been stated, it is probably most consonant to the interests of the parties. It is certain that the assured desires as ample an indemnity as he can obtain, and it is probable that the insurer means that he shall understand the indemnity given to be as extensive as its terms, upon any fair interpretation, import." (Duer on Ins. 161.)

As Brown was not insured as a passenger and traveler, but against all accidents, without regard to the capacity in which he was acting, the reasonable inference is that the ticket was intended to cover the risk and accident by which he met his death. If it be conceded that the meaning of the ticket is doubtful or ambiguous, still the question must be decided for the plaintiff, as the promisor would not fail to apprehend that the promisee labored under the impression that he was indemnified, and where such is the case, the construction must be most favorable to the insured.

Two further objections are argued against the judgment: first, that the court instructed the jury to give damages for vexations delay in not paying the amount of the policy; and second, that it allowed them to give interest at the rate of six per cent. on the

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amount due from the time defendant was notified of the death of Brown. As to the first objection, the statute in force, and applicable to this case, provides that in any action against any insurance company, if the jury believe that such company has vexatiously refused to pay the loss, they may allow damages not exceeding ten per centum on the amount of the loss, and the court shall enter judgment for the aggregate sum found in the verdict. The whole question of vexatious refusal or delay is a matter of fact to be determined by the jury. They must make up their verdict on this issue by a general survey of all the facts and circumstances in the case; and if, upon a full consideration, they conclude that the refusal was unjustifiable and vexatious, the law authorizes them to assess the damages. The statute will not admit of the construction contended for by the counsel for the plaintiff in error, that before damages are allowed it must be explicitly proved by the plaintiff that the delay or refusal was vexatious.

I am of the opinion that the court committed no error in giving the instruction in relation to interest. The statute declares that creditors shall be allowed to receive interest at the rate of six per cent. per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts. (1 Wagner's Stat. 782, § 1.)

The ticket was a contract between the parties whereby the defendant promised to pay to plaintiff's intestate a certain amount upon the happening of a contingency. When the contingency occurred, the obligation was binding and absolute, and the sum presently due. The rights of the parties were then fixed, and it was the duty of the defendant to pay on notification of the death of Brown; and on its refusal to comply, interest was thenceforth payable. In addition to this law, the statute above referred to, in regard to the assessment of damages, makes express provision for the recovery of interest.

I see no error in the proceedings, and I advise an affirmance of the judgment. Judgment affirmed; the other judges concurring.



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Wallendorf v. County Justices of County Court of Cole Co.

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BART. WALLENDORF, Petitioner, v. COUNTY JUSTICES OF COUNTY COURT OF COLE COUNTY, Respondents.

1. *Revenue — School taxes — Delinquent land list — Warrant for, made out on the county treasury.*—Under the act of 1868, concerning schools (Wagn. Stat. pp. 1246-7, §§ 18-20), the justices of a County Court are bound to issue to the township clerk, on demand, for the use of the schools, a warrant on the county treasury for the amount of the delinquent list of land taxes due the sub-school districts, without waiting until they are collected and paid into the county treasury.

*Petition for mandamus.*

*Johnson & Budd*, for petitioner.

*E. L. King*, for respondents.

WAGNER, Judge, delivered the opinion of the court.

This was a petition by the relator, who is a township clerk, praying for a *mandamus* against the justices of the Cole County Court, who refuse to issue to him a warrant under the provisions of the school law. There is an allegation of all the requisite and necessary proceedings upon his part to entitle him to a warrant, provided the construction of the law contended for prevails. The averments are not denied; but it is insisted that in no event is the clerk, for the use of the schools, empowered to obtain a warrant from the County Court on the treasury, till the school taxes are collected upon which it must be drawn.

The case involves a construction of the law enacted in 1868, concerning schools. The eighteenth section provides for making estimates by the local directors, and prescribes the duties of the township board thereon. The nineteenth section makes it the duty of the township clerk to collect the various estimates, as provided in the preceding sections of the act; and immediately on the receipt of the tax book, to post up at the school-houses, in the various sub-districts, a notice of the time and place for receiving such taxes, which is made a sufficient notice to the tax-payers in such sub-districts, whose duty it is to pay to the clerk the sums thus due, on or before the first day of September following.

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The twentieth section provides that it shall be the duty of the clerk to make out a list of taxes delinquent on the first day of September in each year, and return said list to the collector of the county, who shall give to such clerk a receipt for the same, and shall proceed and collect the same in like manner as State taxes are, or may be by law, collected, together with ten per cent., which shall be added thereto by him as a penalty, and which shall be in full compensation for his services in collecting and paying over such taxes; and he shall, as often as once in each month, pay over to the township clerk all such taxes collected by him, and take the clerk's receipt therefor. The section further provides that the collector shall, at the same time of returning the "land delinquent list" for State and county taxes, return therewith all land school taxes therein provided for, which shall remain unpaid; and when so returned, the same shall become a part of the county tax due on such land, and, as such, shall be collected and paid into the county treasury; and the County Court shall ascertain the amount due each sub-district on such delinquent lands, and draw their warrants on the county treasurer, payable to the township clerk, for the amounts found due. (See 2 Wagner's Stat. pp. 1246-7, §§ 18-20.)

The last section, upon which this case must rest, includes two propositions, or separate lines of action, namely: one in reference to the general delinquent list, the other as respects the "land delinquent list." In the former case it is made the duty of the collector to collect and pay over once in each month. The reason for this is because the collector possesses the means and the power of obtaining the taxes by summary process and sale. Not so, however, where the delinquency arises on account of an assessment against lands. Then the taxes can only be collected, and the lands subjected to sale, by instituting certain proceedings in conformity with the revenue law. It was doubtless seen by the Legislature that if the schools were deprived of the use of this fund till collections could be made, it would be productive of great embarrassment and detriment to the educational interests of the State. Hence, in the matter of the "land delinquent

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list," provision was made that when it was returned it should become a part of the county tax due on such land, and, as such, should be collected and paid into the county treasury. It then becomes essentially a county tax, and the schools have no further control over it. But when the delinquent fund becomes the debtor of the county, the county assumes the position of creditor to the school fund, and upon an ascertainment of the amount due the respective sub-districts in consequence of the delinquent land tax, a warrant issues to them, giving them their just proportion. It operates simply as an advancement. The school directors make their contracts based on estimates and assessments, but, in case of a failure to collect, if no means were provided to supply the deficiency, great injury would result, and, as the tax constitutes a lien on the realty, there is no apprehension of the county suffering on account of the assumption. Wherefore, as the petition only asks for a warrant for the delinquent land list, which was regularly returned, it should be allowed.

Peremptory writ ordered. The other judges concur.

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THE STATE *ex rel.* J. A. SEXTON, Defendant in Error, v. HENRY JERARD *et al.*, Judges of the County Court of Cass County, Plaintiffs in Error.

1. State *ex rel.* Wallendorf v. Cole County Court, *ante*, p. 228, affirmed.

*Error to First District Circuit Court.*

*Terrill*, county attorney, and *Boggs & Sloan*, for plaintiffs in error.

*Harding*, and *Johnson & Budd*, for defendants in error.

BLISS, Judge, delivered the opinion of the court.

The County Court of Cass county refused to draw a warrant upon the treasury in favor of relator, as clerk of a certain township in said county, for educational purposes, for the amount of

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Wilson, Public Adm'r, v. Dozier et al.

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money assessed, for school purposes, upon the lands of the township, and embraced in the land delinquent list returned by the collector, and the relator applied to the Circuit Court of the county for a *mandamus* against the said County Court, commanding it to draw such warrant. The writ of *mandamus* was issued and made peremptory, and the action of the Circuit Court was sustained in the District Court.

The question involved in this record has been decided at this term, in the case of *The State ex rel. Wallendorf v. The Cole County Court*.

The judgment of the District Court is affirmed. The other judges concur.

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JAMES R. WILSON, Public Administrator, Respondent, v. B. L. DOZIER *et al.*, Appellants.

1. Judgment affirmed.

*Appeal from Third District Court.*

*Sherwood*, for appellants.

*Lay & Belch*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

This is the most confused, bungling and unintelligible record that we have ever seen. Nothing is inserted in its proper place, and it is impossible to tell what was really excepted to in the court below. It seems that there were two trials in this case, and an attempt is made to incorporate the proceedings in both trials, but there is really nothing saved in either, even if such a course were permissible, warranting a review here.

In the first trial the bill of exceptions simply inserts the evidence, but does not include the instructions. On that trial, the jury disagreed. In the last trial, where judgment was obtained, and which was the one appealed from, the record simply shows

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the impanneling of the jury, the verdict and judgment, and nothing more. It is hardly necessary to observe that there is nothing here for this court to decide. If parties desire to have their cases reviewed, they must pay some attention to saving their points, and making up the record.

Let the judgment be affirmed. The other judges concur.

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A. H. BOGGS, Plaintiff in Error, v. N. P. BROOKS, Defendant in Error.

1. *Elections — Appeal — Act of 1867, construction of.*—The manifest intention of the act of 1867 (Wagn. Stat. 578, §§ 92-3), providing for appeals in contested election cases, was to allow a trial *de novo* in the Circuit Court.

*Error to First District Court.*

*Johnson & Budd*, for plaintiff in error.

*Hall & Given, Boggs & Sloan, and Terrill & Mather*, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

The proceedings in this case grew out of a contest in regard to the election of public administrator in Cass county. There was a trial in the County Court, and judgment for Brooks, the defendant in error. Boggs, the plaintiff in error, appealed to the Circuit Court, where his appeal was dismissed on the ground that the case could not be tried *de novo* in the Circuit Court. This ruling being approved in the District Court, the case is brought here for revision on writ of error.

The only point raised involves a construction of the act of 1867, providing for appeals in contested election cases. The first section declares that any person feeling aggrieved by any judgment or decision rendered by any County Court, in any contested election case or proceeding, may appeal therefrom to the Circuit Court of the county where the judgment or decision may be rendered.



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The next section enacts that no appeal shall be allowed in any such case or proceeding, unless the party appealing, or some person for him, together with one or more solvent securities, to be approved by the County Court, or the clerk thereof, shall, within twenty days after the rendition of the judgment or decision, enter into bond to the adverse party in a sum sufficient to secure the payment of all costs which may have and may thereafter, by reason of the appeal, lawfully accrue, in the case or proceeding, conditioned that the applicant will prosecute his appeal, with due diligence, to a decision; and that if, on such appeal, the judgment or decision of the County Court be affirmed, or, upon a trial anew in the Circuit Court, judgment be given against him, he will pay all costs which may be adjudged against him. (1 Wagn. Stat. 578, §§ 92-3.)

Previous to the enactment of this statute there was no law in this State authorizing appeals in contested election cases. But this gives an appeal in direct terms, and makes it incumbent on the appellant to give bond and security in the same manner as in appeals from justices' court, and renders him liable, if, in a trial anew in the the Circuit Court, judgment is given against him.

It is conceded that there is no direct grant given authorizing a new trial on the facts; but the implication is so apparent that no one ought to be misled. What is meant by the words, "upon a trial anew?" Why, plainly that the appellant—the party deeming himself aggrieved—should have a new trial in the appellate court, upon the facts and evidence. If we admit that the construction of the section is inartificial, still the intention of the Legislature is manifest and unmistakeable, and the plain meaning should never be sacrificed to verbal distinctions and technical criticism.

I think it is beyond all question that the intention was to allow a new trial in appeals of this kind, and the judgment will therefore be reversed and the cause remanded. The other judges concur.



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 Kirby et al. v. Bruns et al.
 

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KIRBY & MENSE, Plaintiffs in Error, v. BRUNS & BRUNS, Defendants in Error.

1. *Equity—Improvements by husband on land of wife—Value of, reached by his creditor.*—The value of improvements placed by the husband on the land of the wife may be reached through appropriate chancery proceedings, and the amount thereof applied to the payment of claims existing against him at the time of such investment; in such case, when the estate can not be successfully apportioned in partition, chancery will decree a sale of it, and a division of the proceeds according to the rights of the respective parties.
2. *Practice, civil—Case involving law and equity—Voluntary non-suit, effect of.*—Where a suit involving legal and equitable proceedings was laid before a jury, and plaintiff voluntarily took a non-suit of the case without submitting the equity branch to the court at all, this court will not relieve him.

*Error to First District Court.*

*White, and Ewing & Smith, for plaintiffs in error.*

I. This expenditure by Bruns was a settlement on his wife, and he being at the time in debt, the settlement was a nullity. (Reade v. Livingston, 5 Johns. Ch. 504; Sto. Eq. 355, 357, 359, 368; How & Wallace v. Waysman *et al.*, 12 Mo. 171-4; Beach & Eddy v. Baldwin, 14 Mo. 597-8; Pawley v. Vogel, 42 Mo. 303; Tyler on Married Women, etc., 641; McIlvaine v. Smith, 42 Mo. 45, 58, 59.)

II. Though the title to the land may have been in the wife of Bruns, yet if he, while in debt, used the money that should have gone to his creditors in putting improvements on that lot, his creditors were entitled to those improvements. (Pharis v. Leachman, 20 Ala. 683-4; Love v. Graham, 25 Ala. 187-94; 11 Ala. 386.) The same doctrine is recognized in the matter of Grant, 2 Story, 320, in a bankruptcy proceeding.

III. Parties should not be driven out of court because of the insufficiency of the pleadings, if it is manifest that they are entitled to some sort of relief. (Dellinger v. Higgins, 26 Mo. 180-3.) If the parties appear to have consented to the trial of both causes, it will be considered as waived. (Jones v. Moore, 42 Mo. 491; 37 N. Y. 433; Young v. Coleman, 43 Mo. 184-5; City of St. Joseph v. Hamilton, *id.* 287; Freeman v. Bloomfield, *id.* 391.)

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*Lay & Belch*, for defendants in error.

I. Plaintiff improperly united a legal and equitable cause of action, and submitted the whole to the jury. (38 Mo. 395; 41 Mo. 257; 26 Mo. 47; 43 Mo. 139.)

II. Where the non-suit is voluntary, this court will not interfere. (33 Mo. 87.)

CURRIER, Judge, delivered the opinion of the court.

The petition in this cause contains two counts—one in ejectment, and one in equity. No issues were framed under the equity count for submission to a jury, but a jury trial was had, as in an ordinary action at law. The plaintiffs insist, nevertheless, that the trial was in fact upon the equity count alone; and on that they now seek to stand, rejecting as superfluous the law branch of the case. The suit involves the title to certain premises in Jefferson City. The equity count charges that the original lot, without improvements thereon, was acquired with the funds and means of the defendant, Herman L. Bruns; and that the title thereto was vested in his wife, Mrs. Maria C. Bruns, the other defendant, in fraud of the right of said Herman L. Bruns' creditors, he at the time being in an insolvent condition. It is further charged that Bruns, after the purchase, in like fraud of his creditors, among whom were the plaintiffs, made valuable improvements upon said lot. Bruns' interest in the premises, as the petition avers, was levied upon and bought in by the plaintiffs at execution sale.

The evidence preserved in the bill of exceptions does not, in my opinion, sustain the allegation that the original lot was acquired with the funds and means of the defendant, Herman L. Bruns. But it very clearly shows that the dwelling-house and other improvements subsequently placed thereon, at a cost of some \$2,500 or \$3,000, were placed there by him and at his cost and expense. We entertain no doubt that the value of these improvements may be reached through appropriate chancery proceedings by his creditors, and the amount thereof applied to the payment of claims against Bruns existing at the date of such investment. (See *Pharis v. Leachman*, 20 Ala. 662; *Love v. Graham*, 25 Ala. 178.)

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The circumstance that the defendants have so mingled their separate interests in the property that those interests can not now be successfully apportioned in the way of a partition of the estate, can not be allowed to defeat the just rights of Bruns' creditors. On a proper case made, chancery will decree a sale of the property and a division of the proceeds according to the rights of the respective parties. (See cases cited above.)

But the case has been greatly confused by an attempt to combine legal and equitable proceedings in the same action. As a chancery proceeding, no issues having been framed for submission to a jury, the trial should have been by the court, and a decision had upon the equitable merits of the cause. But the hearing was before a jury, and because the jury were supposed to have been improperly instructed as to the law of the case, the plaintiffs took a non-suit without a submission of the equity branch of the case to the court at all. They still adhere to their abandonment of the ejectment branch of the suit, treating it as mere surplusage, and seek a restoration of their standing in court that they may try the equity branch of the case. This practice is not allowable. The non-suit as to the equity side of the litigation was purely voluntary, and the case must be disposed of as in other instances of voluntary non-suit. (19 Mo. 647; 20 Mo. 323, 432; 28 Mo. 539; 32 Mo. 542; 33 Mo. 87, 374.)

The judgment will be affirmed. The other judges concur.

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ADAM ROUTSONG, Defendant in Error, v. PACIFIC RAILROAD,  
Plaintiff in Error.

1. *Practice, civil—Instructions—Evidence not weighed by Supreme Court.*—In trials at law, this court will not attempt to weigh evidence. But when there is a complete failure of evidence this court will intervene to prevent injustice being done.
2. *Practice, civil—Bill of exceptions should state that it contains all the evidence.*—A bill of exceptions is defective in not stating that it contains all the evidence which was given in the cause.

*Error to First District Court.*

*King Brothers*, for plaintiff in error.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff commenced his action in the Cole County Circuit Court, claiming a balance of four hundred and forty-one dollars and fifty cents, on account of a certain lot of cord-wood contracted for, sold, and delivered by him to the defendant. The answer denies all the material averments of the petition.

The case was tried before a jury, and the plaintiff had a verdict and judgment in the Circuit Court, which judgment was affirmed in the District Court.

It is contended here on behalf of the plaintiff in error that the evidence fails to support the verdict, and also that there is an entire want of evidence. It is unnecessary to repeat that it is the long established and well settled doctrine of this court that we will not undertake to weigh the evidence or interfere with the verdict of juries if the court has not erred in instructing them. Where there is a total and complete failure of evidence, this court will intervene to prevent injustice being done. The chief complaint is that the court erred in refusing the fourth instruction asked by the defendant, to the effect that, under the pleadings and evidence in the case, the plaintiff could not recover. To authorize or render permissible such an instruction, the evidence must not merely be weak, but in fact there must be no evidence. Upon an examination of the record, I can not say that there was no evidence conducing to prove the issue tendered by the plaintiff, though I think it was slight. From the fact that the plaintiff's wood was placed alongside of the road with his name upon it, and that defendant's agent measured the wood, and the road used it, the jury might have inferred or deduced a contract. It was not necessary to prove an express contract. It might be implied from facts and circumstances. It is true, there was also evidence tending to show that the wood was furnished to another party from whom the road purchased. But it was at least a question of fact for the jury to determine, and not within the province of the court to decide.

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The other instructions given for both plaintiff and defendant were wholly unexceptionable, and placed the law fairly and clearly before the jury. The bill of exceptions is defective in not stating that it contains all the evidence that was given in the cause. This being the case, and as every necessary presumption will be indulged in favor of the judgment of the court below, we will affirm the judgment. There is an exception taken to the action of the court in admitting testimony, but the objectionable parts were principally ruled out by an instruction, and the remainder we do not think could have injuriously affected the defendant.

Upon the whole case we see nothing authorizing us to interfere with the verdict, and are of the opinion that the judgment should be affirmed. The other judges concur.

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JOHN T. COATES, Defendant in Error, v. THE UNITED STATES EXPRESS COMPANY, Plaintiff in Error.

1. *Carriers—Associations of—Joint liability for losses at any point in transit.*—Where carriers on connecting routes form associations and arrangements for the purpose of carrying goods or parcels through the whole line, they are, beyond question, partners, and each is responsible for any loss or injury to goods which may happen, in whatever part of the line it occurs.
2. *Carriers—Express companies—Goods lost in transit beyond their line of transport, who responsible for.*—In a suit against an express company for goods lost in transit beyond its line of conveyance, where the evidence showed no payment for the whole route, and no understanding, usage or agreement that the company assumed to be responsible for the goods after they left its own line: *held*, that it was only bound under its contract or undertaking to transport them safely to the point on its line nearest the place of destination, and then to deliver them to the proper carrier to be forwarded, and that having done this it was not responsible for a subsequent loss.

*Error to Fourth District Court.*

Cline, Jamison & Day, with Henry & Williams, for plaintiff in error.

I. In the absence of a special contract, the carrier is only liable for the extent of his own route, and for safe storage and delivery to the next carrier. (1 Redf. on Railw. 282, 283; Van



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Santvoord v. St. John, 6 Hill, 158; Hood v. N. Y. & N. H. R.R. 22 Conn. 1, 502; 23 Verm. 186; Nutting v. Conn. R.R., 1 Gray, 502; 25 Wend. 66; 24 Conn. 468.)

II. When goods are delivered to a carrier marked for a particular place, he is only bound to transport and deliver them according to the established usage of the business, whether that usage be known to the shipper or not. (6 Hill, 157; 18 Verm. 140; 23 Verm. 209; Hempstead v. N. Y. Central R.R. Co., 28 Barb. 485; 2 Pars. on Cont. 212.)

*Porter Brothers*, for defendant in error.

I. Although the U. S. Express Company did not, by its own line, reach nearer to Trenton than Macon, yet, having delivered the package to the American Express Company, it made the latter company its agent, and through such agency forwarded the package beyond Macon, and is therefore responsible to the same extent as if the package had been forwarded by their own line. (St. John v. Van Santvoord, 25 Wend. 660.)

II. And such agency existed, although such delivery was made in accordance with custom, and may have been with the knowledge, express or implied, of the defendant in error. Although the company may have had the right, according to custom, to re-ship, their liability still continued after their re-shipment. (Little v. Semple, 8 Mo. 99; Carr v. Steamboat Michigan, 27 Mo. 196.)

WAGNER, Judge, delivered the opinion of the court.

This was an action brought by the plaintiff against the defendant, as a common carrier, to recover the sum of \$300, alleged to have been delivered to it for transmission from the town of Allen, in Randolph county, to the town of Trenton, in Grundy county.

On the trial, it was agreed between the parties that the express company received the package, and that it contained \$300; that the company forwarded it to Macon City, which was the nearest point of destination reached by the company, and that it there transferred and delivered the package to the American Express



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Company, which was a responsible forwarding agent, and the only express company forwarding from Macon City to Trenton, and that it was the usual line for carrying express matters upon that route.

The following is a copy of the receipt given by the company at the time it received the package :

“UNITED STATES EXPRESS COMPANY, }  
ALLEN, December 2, 1865. }

“Received of John T. Coates one package, said to contain money valued at three hundred (300) dollars, and marked Cliff A. Evans, Trenton, Mo., which we undertake to forward to the nearest point of destination reached by this company, only perils of navigation excepted. And it is hereby expressly agreed that said United States Express Company are not to be held liable for any loss or damages, except as forwarders only,” etc.

Upon the foregoing evidence the courts below gave judgment for plaintiff.

There is undoubtedly some conflict in the reports as to whether a carrier, receiving goods to be transported to a point beyond his own line, is liable when they are lost, where he has forwarded them to their destination upon another route. Where carriers on connecting routes form associations and arrangements for the purpose of carrying goods or parcels through the whole line, and share the profits, they are, beyond question, partners, and each is responsible for any loss or injury to goods which may happen, in whatever part of the line it occurs. The English doctrine seems to be in favor of the rule that a carrier who knowingly receives a parcel, directed or consigned to any particular place, undertakes to carry it there himself, unless he makes known a different purpose and undertaking to the owner. As a consequence of this rule, it is held that the owner has no contract with the second carrier, and can not recover of him for damages done on his end of the route. This principle was distinctly announced by Lord Abinger, in the leading case of *Muschamp v. The L. & P. Junction Railway Co.*, 8 M. & W. 421, and has been since followed by later adjudications. A similar doctrine was at one time announced by the Supreme Court in the State of

New York, in the case of *St. Johns v. Van Santvoord*, 25 Wend. 660; but that decision was reversed in the court for the correction of errors, Chancellor Walworth delivering the leading opinion. (*Van Santvoord v. St. Johns*, 6 Hill, 157.) In the American States the English doctrine is now almost entirely overthrown. It seems to be the established law that a carrier may receive a parcel to carry as far as he goes, and then to send it further by another carrier. And where such is the clear and admitted case, his responsibilities as carrier and forwarder are distinct.

Professor Parsons, after speaking of the diversity that exists between the English and American cases, comes to the following conclusion: "The prevailing rule in this country may now be said to cast upon the carrier no responsibility, as a carrier, beyond his own route (requiring, of course, due care in forwarding the parcel), unless the usage of the business, or of the carrier, or his conduct or language, show that he takes the parcel, as carrier, for the whole route. And his receipt of payment for the whole route would be evidence going far to prove such undertaking." (2 Pars. on Cont., 5th ed., 213.) And this position seems to be well sustained by the authorities. (*Van Santvoord v. St. Johns*, *supra*; *Hempstead v. New York Central R.R. Co.*, 28 Barb. 485; *Quinby v. Vanderbilt*, 17 N. Y. 306; *Northern R.R. Co. v. Fitchburg R.R. Co.*, 6 Allen, 254; *U. S. Ex. Co. v. Rush*, 24 Ind. 403; *F. & M. Bank v. Champlain Tr. Co.*, 18 Verm. 148; 23 Verm. 209; *Hood v. N. Y. & N. H. R.R. Co.*, 22 Conn. 1; *Nutting v. Conn. R.R. Co.*, 1 Gray, 502.)

The record discloses no payment for the whole route, nor any understanding, usage, or agreement that the company assumed to be responsible for the package after it left its own line. I think, then, the company was only bound, under its contract or undertaking, to transport the package safely to Macon City, that being the point on its line nearest the place of destination, and there to deliver it to the proper carrier to be forwarded to its destination; and, having done this, the company was not responsible for its subsequent loss. The judgment should be reversed.

Reversed. The other judges concur.

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State ex rel. Lexington & St. Louis R.R. Co. v. Saline County Court.

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STATE *ex rel.* LEXINGTON & ST. LOUIS RAILROAD COMPANY,  
Petitioner, *v.* SALINE COUNTY COURT, Respondent.

1. *Corporations—Railroads—Subscriptions to, vote upon—Definite amount of stock must be voted for.*—The law authorizing the Saline County Court to subscribe stock in the Lexington & St. Louis Railroad Company, expressly provided that the subscription should not be made unless a majority of the taxpayers should vote for it, "specifying the amount." The order of the County Court submitting the question to the people called on them to vote for or against an amount "not exceeding \$70,000," leaving the precise amount undetermined. The entry in the records of the County Court, subsequent to the vote, declared that the election resulted "in favor of levying a tax of \$70,000, to subscribe the same to the capital stock of the Lexington & St. Louis Railroad." In *mandamus* against the court to compel the issue of the bonds, and levy of tax for their payment: *Held*, that such entry was not a conclusive finding of the court of the fact that the taxpayers voted to subscribe the specific sum of \$70,000, but that under a fair interpretation of the record, it showed merely that the question submitted had received a majority of the votes. The bonds of a county can be made valid only by a substantial compliance with the law that authorizes their issue; and the failure of voters to specify their amount, in the case at bar, rendered bonds issued in pursuance of such vote invalid.

*Petition for mandamus.*

*A. & T. A. Green*, for relator.

I. The finding of the County Court is conclusive in this case, and can not be collaterally inquired into. The presumption is that such finding was correct, and that the bonds were legally issued, and the court is estopped by their own recitals of record from controverting or impeaching the legality of the election. (21 How. 539; 33 Mo. 440.)

II. The railroad company was an innocent purchaser. (Sess. Acts 1860, pp. 455-6.)

*W. Adams* and *J. R. Vance*, for respondent.

Under the law, the County Court had no power to subscribe any amount whatever unless the precise amount to be subscribed had first received a majority of the votes of the tax-payers of the district at an election held for that purpose. The power to subscribe is a statutory power, and can only arise when the terms of

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the statute have been strictly complied with. (Sess. Acts 1860, pp. 455-6; 2 Redf. on Railw. 403; Mercer County v. Pittsburg & Erie R.R., 27 Penn. St. 389, in point; Starin v. Genoa, 23 N. Y. 449; Fowler v. St. Joseph, 37 Mo. 237-8; 41 Mo. 230; State, etc., v. Boon, 44 Mo. 254.)

BLISS, Judge, delivered the opinion of the court.

On the 22d of January, 1861, the General Assembly passed an act authorizing a certain subscription to the stock of relator, and the following is a copy of section 1: "Section 1. It shall be the duty of the County Court of Saline county, for and on behalf of the tax-payers owning taxable property in all that district or territory in said county comprising Salt Pond township, and that portion of Grand Pass township lying south of sectional line beginning at the northwest corner of Col. McDowell's farm in said county, and running west to the Lafayette county line, to subscribe to the capital stock of the Lexington & St. Louis Railroad Company an amount not exceeding seventy thousand dollars, upon the condition that said road be located north of the town of Brownsville in said county, provided such subscription shall not be made unless a majority of said tax-payers, at an election to be held in said district, shall vote in favor of such subscription, specifying the amount."

The act further provides that the issuing of bonds on behalf of said district, the assessment of taxes to meet them, the appointment of an agent to make the subscription, etc., all shall be done by the County Court.

On the 4th of February following, the County Court ordered an election in said district, to be held on the 18th of February inst., to decide "as to whether they (the tax-payers of said district) shall subscribe to the capital stock of the Lexington & St. Louis Railroad Company an amount not exceeding seventy thousand dollars," and that the sheriff give notice, etc. On the 23d of February the county clerk canvassed the vote which was taken on the day for electing delegates to a State convention, embodying it in the canvass of the whole county, in which he recites that the election was held "on the 18th day of February,

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A. D. 1861, for delegates to the State convention, and to take the sense of the tax-payers of Salt Pond and Grand Pass townships as to the propriety of subscribing \$70,000 to the Lexington & St. Louis Railroad," etc., which canvass shows that 292 votes were cast "for railroad," and 111 votes "against railroad." On the 2d of April next the following proceedings were had in said County Court, to-wit: "It appearing to the court that the election provided for by law approved January 22, 1861, to be held in Salt Pond township, and that portion of Grand Pass township lying south of sectional line beginning at the northwest corner of Col. McDowell's farm in said county, and running west to the Lafayette county line in this county, has been held according to law, and resulting in a vote of a majority of the tax-payers of said township or district designated in favor of levying a tax of \$70,000, to subscribe the same to the capital stock of the Lexington & St. Louis Railroad: now, then, it is therefore ordered by the court that William B. Kinkaid be and he is hereby appointed and empowered, as the agent of this court, to do whatever said agent may do under and by virtue of such act aforesaid."

Bonds to the amount of \$70,000 were on the 16th of April duly issued and delivered to Mr. Kinkaid, the agent, and the amount and description of each was spread upon the record; but on the 2d of February, 1864, an order was made upon said agent to report the disposition he had made of the bonds, and on the 15th he reported that he had delivered a part to the company, amounting to \$14,000, and that the remainder were still in his possession. Those remaining undelivered he passed over to the court, and was discharged as agent.

Immediately after the appointment of said Kinkaid as agent, the books of the railroad company showed that he made a subscription to its capital stock in the sum of \$70,000. It is also shown that the relator suspended work upon the road during the war, but that within the last year it has nearly completed the bed of the same; that the road is located north of said town of Brownsville, but that, on recommencing work, a new route between Lexington and Brownsville was chosen, running into



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the original line at the last-named town, which route was shorter than the old one by several miles, and distant from it when it entered Saline county from four to six miles. It is further shown that before the passage of the act of June 22, 1861, the railroad company, not then incorporated, had surveyed three routes, the one finally adopted being called the northern route; that before its adoption, citizens of Saline county interested in said route had urged it upon the company, who offered to take it upon condition of a subscription of \$70,000 to the capital stock of the company, and that, in pursuance of this offer, the passage of the said act was procured and proceedings under it had. The depositions of several witnesses show that the route as changed is of far less benefit to the district on whose behalf the bonds were issued than the old one, and that on the day of the election to authorize the subscription no specific sum was named, but that the people voted "for" or "against" "railroad," according to the order of the County Court submitting the question.

The records of the County Court also show that the president of the railroad company, on the 8th day of May, 1869, demanded of the court the \$56,000 in bonds retained by them, and that they were refused, and the petition asks: 1. That the said County Court be commanded to deliver to the relator the said bonds so retained by it; and, 2. That it be commanded to levy a tax upon the inhabitants of the proper district to pay the principal and interest due upon the bonds, amounting to \$14,000, actually delivered by the agent of the court.

The defendant insists that the relator is not entitled to the interposition of the courts in its behalf, for various reasons. First, because the subscription to the stock and execution of the bonds was unauthorized by the tax-payers of the district. The law under which the proceedings were had, expressly provides, as before recited, that the subscription shall not be made unless a majority of the tax-payers shall vote for it, "specifying the amount." A subscription "not exceeding \$70,000" is authorized, but the specific amount must be decided by the tax-payers themselves, and without such specification, the County Court is powerless in the premises. We have, then, first to inquire whether such decision has been had.



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The order of the County Court, submitting the question so far as it is evidence upon the subject, shows that no amount was specified by the vote. The tax-payers were called upon to decide, not whether there should be a subscription of \$70,000, or any other specific sum, but for or against "an amount not exceeding \$70,000," leaving the precise amount undetermined. It seems to have been the idea of the County Court that the tax-payers should only be called upon for a general authority, and that the court might determine the amount, or that the voters should, in some way, fix the amount themselves. The relator claims that they did so specify the amount, and, for proof, adduces the subsequent action of the court and the clerk in canvassing the votes. But that action lacks precision and clearness. The clerk, whose duties were wholly ministerial and could decide nothing, recites that a vote was had to take the sense of the tax-payers, etc., "as to the propriety of subscribing \$70,000," etc., evidently referring to the submission by the County Court, which did not specify the amount, and says that 292 votes were cast "for railroad" and 111 votes were cast "against railroad." The subsequent entry in the records of the County Court says that the election resulted in favor of levying a tax of \$70,000, to subscribe the same to the capital stock of the Lexington & St. Louis Railroad, when, in fact, under the law and under the order, there could have been no such vote. The vote could only have been to subscribe for stock, and not to levy a tax of any amount, and, if this entry is claimed to have the effect of a judicial finding, to be conclusive and to estop the court from disputing the facts found—to have the force of a judgment—we must scrutinize it and see what is concluded. The court, then, are concluded from denying that the people voted to levy a tax of \$70,000, to subscribe the same to the stock of the company; which, as we have seen, could not be true, or, if true, goes beyond the law. Nor did the subsequent action of the court conform to any such vote; for their agent subscribed to the capital stock of the company without levying any such tax. The claims, then, of the relator so strongly insisted upon, that the fact that the tax-payers voted for a subscription of the specific amount of \$70,000 has been

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concluded by a judicial finding of the County Court, and can not be disputed, is altogether untenable, for it proves too much. It kills the bonds; for, according to the finding, the subscription must be paid for by taxation, and not by bonds. Such would be its strict construction; but, by comparing it with the order of submission, its liberal interpretation would be that the question submitted had received a majority of the votes. In addition, there is parol testimony that no specific sum was voted for, but that the people simply voted for or against a railroad. The fact, then, must be taken as established, that the law in this particular was not complied with, and we have only to consider the effect of the failure upon the bonds.

It is unnecessary to say that the bonds of a county can only be made valid by a substantial compliance with the law that provides for their issue. This is especially true in relation to the authority to issue them. Some informalities in detail may be overlooked; but where the law designates the board, or the persons who must decide either in relation to their issue or their amount, that decision can not be dispensed with. If the matter is intrusted to the people of a district, they must decide it. If that people are to specify the amount, the specific amount must be submitted to their vote, and in that regard there was a fatal mistake in the case at bar. This is not a new question. In *Mercer County v. Pittsburgh & Erie R.R. Co.*, 27 Penn. St. 389, it was held that discretionary power touching a subscription to the stock of a railroad company could not be transferred or exercised by any other person or body than the one to whom it was granted. The Legislature had authorized the commissioners of Mercer county to subscribe for shares in the capital stock of defendant; but the act provided that the amount of the subscription should be designated by a grand jury of the county. The grand jury authorized a subscription "to an amount not exceeding \$150,000." The commissioners subscribed for \$150,000, and issued bonds for the amount. The court enjoined the company from selling the bonds in its possession, and ordered their restitution to the county, and principally upon the ground that they were issued without authority—the grand jury, instead of

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deciding the amount themselves, having transferred the decision to the county commissioners. *Starin v. Genoa*, 23 N. Y. 439, was an action by a purchaser of a bond, but with notice, issued by the town of Genoa to a railroad company. The condition imposed by the act authorizing its issue by the town authorities was the written consent of two-thirds of the resident tax-payers appearing on the assessment roll. The plaintiff was required to show affirmatively such written assent before he could recover on the bond.

The relator claims that its right to the bonds is sustained by the doctrine of *Commissioners of Knox County v. Aspinwall*, 21 How. 539, and *Flagg v. Palmyra*, 33 Mo. 440. In the former case, under authority of the Legislature of Indiana, the Commissioners of Knox County had subscribed for \$200,000 of the capital stock of the Ohio & Mississippi Railroad Company. The bonds were regularly issued and negotiated to Aspinwall and others, who brought suit against Knox County upon the coupons that had fallen due. The defense was that sufficient notice had not been given of the election when the vote was taken authorizing the subscription. The court held that inasmuch as the board of commissioners had decided that the election was regular and issued the bonds, an innocent holder was not bound to look further. Says Judge Nelson, on page 544, "We do not say that the decision of the board would be conclusive in a direct proceeding to inquire into the facts previous to the execution of the power, and before the rights and interests of third parties had attached; but after the authority has been executed, the stock subscribed, and the bonds issued, and in the hands of innocent holders, it would be too late, even in a direct proceeding, to call it in question. Much less can it be called in question to the prejudice of a *bona fide* holder of the bonds in this collateral way." It will be seen that the court only holds that an irregularity of notice, which is not a matter of record, and could not be known to the purchaser of the bonds, shall not invalidate them in the hands of an innocent holder. It is a very different question from the one before us, for here the defect was on the record. Most of the bonds have not been issued, and those issued were

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not negotiated, and the proceeding is a direct one against the County Court, and involves the whole question.

The language of the court in *Flagg v. Palmyra* goes further than the last-named case, but the decision is substantially the same. The irregularities complained of did not go to the authority to issue the bonds, and the plaintiff to whom they had been negotiated was an innocent holder.

The relator claims the benefit of the protection given innocent holders of such paper, inasmuch as a consideration has been paid by building the road. But an innocent holder is something more. He must not only have paid a consideration, but be without notice, and have used all proper diligence to be informed. The relator is a direct party to the proceeding, and knew everything; and to the complaint that the consideration has been performed, it may be replied that the hardship is not all on one side. Though the change of the track of the road would not of itself release the obligation involved in the subscription so long as its written conditions were performed, yet it has defeated the main object of the subscription; and had it been located where it now runs when the vote was taken, the majority would doubtless have been the other way.

We are not disposed to encourage violations of contracts by giving importance to technical informalities. Those who voluntarily assume burdens should bear them manfully when their weight comes to be felt. If towns or counties will become stockholders in railroads or other corporations, it ill becomes them to shirk the responsibility they have assumed. But from the nature of the case, such corporations can only make contracts when authorized, and as authorized, by law. Individuals may waive irregularities by subsequent assent, but on behalf of the taxpayers there is no one authorized to waive anything.

The additional consideration should not be forgotten that the property of those who opposed this subscription is as liable to assessment as though they had favored it; thus, in a manner, it is taken for public use without consent or compensation. This can only be done by specific provisions of law, and they have a right to resist the exaction—to resist the attempt to make them



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unwilling stockholders of a corporation — unless the steps of the law are substantially followed. The County Court, in the present case, are wholly powerless, except as authorized to act by those whose agents they were. No authority having been given them to subscribe any specific amount, we can not compel them by *mandamus* to complete an unauthorized procedure.

It is unnecessary to indicate what would be our action had the bonds gone into circulation and been in the hands of innocent holders, as that case has not arisen ; nor need we give an opinion upon the various other points raised by the defendant.

The writ is refused. The other judges concur.

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M. G. SINGLETON & Co., Respondents, v. BOONE COUNTY HOME  
MUTUAL INSURANCE COMPANY, Appellant.

1. *Fire insurance — Policy — Conditions — Meaning of words "partial" and "total" modified by understanding of parties.* — Attached to a fire insurance policy were the following conditions: "2. In case of total loss the company is not liable to pay more than two-thirds of the actual value of the building at the time of the loss, nor more than one-half the value of the personal property," and "3. Partial losses are paid in full, not exceeding the amount insured, provided the insured has on hand the lowest amount stated in the application." The amount of goods to be kept on hand, was stated in the application to be of the value of \$3,000. The loss of the insured was \$3,859, property of the value of some seventy dollars having been saved, making the total value of the stock on hand at the time of the loss, \$3,929. *Held*, that the words "at the time of the loss," mentioned in the second clause, were applicable not only to the real property but the merchandise on hand at that particular time, and that within the true meaning of the two clauses taken together the loss was not partial so as to entitle the insured to recover the full amount of his insurance. The meaning of the words "partial" and "total" should be taken subject to such modification as may be necessary to an ascertainment of the actual understanding and intention of the parties.

*Appeal from Fourth District Court.*

*Prewitt*, for appellant cited *Egan v. Mutual Ins. Co. of Albany*, 5 Denio, 326; *Post v. Hampshire Mutual*, 12 Metc. 555; *Ashland Mutual Ins. Co. v. Housinger & Norton*, 10 Ohio St. 10; *Huckins v. People's Mutual Ins. Co.*, 11 Foster, 238;

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Allwood v. Union Mutual Ins. Co., 8 Foster, 234; Haley v. Dorchester Mutual Fire Ins. Co., 12 Gray, 545; Allwood v. The Mutual Ins. Co., 8 Foster, 240; Haskins v. People's Mutual Ins. Co., 11 Foster, 249; 8 Metc. 114; 2 Denio, 78; 2 Comst. 210; 30 N. Y. 136.

*O. Guitar*, for respondents.

I. The terms, "total loss" and "partial loss," used in the policy sued on, are to be taken and understood in their natural and ordinary sense. Said terms have no peculiar or technical meaning when applied to fire insurance. (Ellis on Fire & Life Ins. 136, note 1; Liscom v. Boston Mutual Fire Ins. Co., 9 Metc. 205; Trull v. Roxbury Mutual Fire Ins. Co., 3 Cush. 267; Underhill v. The Agawam Mut. Fire Ins. Co., 6 Cush. 440.)

II. The case of the Ashland Mutual Ins. Co. v. Housinger & Norton, 10 Ohio St. 10, fully sustains the view taken by respondents.

III. The amount insured must be paid, if it does not exceed the amount of the loss. (Underhill v. Agawam Mutual Fire Ins. Co., 6 Cush. 440.)

CURRIER, Judge, delivered the opinion of the court.

This suit was brought to recover the amount alleged to be due the plaintiffs under a policy of insurance issued to them by the defendant. Attached to the policy, and made a part of it, was the following condition, namely: (1.) "Insurance is in no case made on more than two-thirds of the value of any building, nor more than one-half the value of furniture, or one-half of the average amount of stock in trade; (2.) and, in case of total loss, the company is not liable to pay more than two-thirds of the actual value of the building at the time of its loss, nor more than one-half the value of personal property; (3.) partial losses are paid in full, not exceeding the amount insured, provided the insured has on hand the lowest amount stated in the application." The case turns on the construction to be given to the provisions of this condition.



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1. The first clause enunciates a principle by which the company proposed to be governed in granting insurance, prescribing the rule that it would assume the risk of no more than two-thirds the value of buildings, and one-half the value of furniture, and one-half the average value of merchandise on hand which might be insured. Half the average of merchandise is taken; since, from the nature of the case, the amount on hand would fluctuate according to the exigencies of the business. The principle, however, is the same. The insurer and the insured were to divide the risk. This was the declared policy of the company, and both parties must be presumed to have contracted with reference to it. The succeeding clauses are designed to carry out this policy and make it effectual.

2. The second clause relates to the adjustment of losses when the loss is total. It unquestionably provides, in the case of loss of buildings, that the liability of the insurer shall be limited to two-thirds of their actual value "at the time of loss." In case of personal property, the liability is limited, with equal certainty, to one-half its value; but whether at one-half its value at the time of loss, or at some other time, is the point to be settled. It has been contended by the plaintiff's counsel that the words "at the time of loss," applicable to real property, do not apply to merchandise on hand at that particular time.

The ground taken is not tenable. The words in question are clearly applicable to "furniture," where there has been a total loss of that class of insured property. That is, no more than one-half of the actual value of the furniture on hand at the time of loss could be recovered by the insured in any case; but, as respects the adjustment of the loss, there is no distinction made between furniture and merchandise. Both are grouped together and classed as "personal property," so that what applies to one applies equally to both. It is true that the words "at the time of loss," used in connection with the term "buildings," is not repeated when personal property is spoken of, but the evident sense is the same as though they were. It is manifest from the whole cause that it was the purpose of the company to limit its liability in case of loss of personal property, whether furniture or

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merchandise, to one-half the value of the property at the time of loss. This construction accords with the declared policy of the insurers, and is the easy and natural rendering of the provision; while the construction contended for by the plaintiffs is difficult and rests on a point of mere verbal criticism.

3. But the third and last clause of the provision under examination provides that partial losses shall be "paid in full, not exceeding the amount insured, provided the insured had on hand the lowest amount stated in the application."

In this case the insurance was on merchandise, and was for \$3,000. No maximum, minimum, or average amount of goods to be kept on hand is stated in the application. The application is simply for so much insurance, without any specification of the value or average value of the stock to be insured. These results—that is, the minimum or average amounts—are attempted to be reached in the way of argumentation and arithmetical calculations based on the amount actually insured. Nothing is proved in that way. The average being, for instance, \$3,000, the maximum might be \$4,000 and the minimum \$2,000; or the maximum might be \$5,000 and the minimum \$1,000. The higher the maximum rose the lower the minimum would fall, the average being preserved. In a word, the parties saw fit to fix neither the maximum nor minimum of goods to be kept on hand. The plaintiff's loss was \$3,859, property of the value of some \$70 being saved from the wreck, making the total value of the stock on hand at the time of the burning \$3,929. As goods to the value of some \$70 were saved, it is therefore claimed that the loss was partial, and not total, and that the insured is consequently entitled to recover the full amount insured—namely, \$3,000—under that provision of the policy which stipulates that partial losses shall be paid in full, not exceeding the amount insured, provided the insured has on hand the lowest amount stated in the application. According to the literal reading of the clause in question, the claim is well founded. But the literal reading is evidently not the true one. It does not express the meaning of the parties. If it did, then the insured, under the facts stated, his loss being partial, would be entitled to recover fifty per cent. more damages than he would, had his loss been

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total, and had nothing been saved from the wreck. Such a result is too unreasonable and absurd to be considered as having been contemplated or intended by the parties. A construction which leads to such consequences is to be avoided. The words "total loss" and "partial loss," as employed in this policy, are undoubtedly to be understood in their natural and usual sense—subject, nevertheless like other words, to such modification of their ordinary import as may be necessary to the ascertainment of the actual understanding and intention of the parties. In construing them, reference must be had to the subject-matter of the contract, its scope and purpose, and the context surrounding the particular words. When thus construed it is perfectly clear that the words in question could not have been understood by the parties in the sense which the plaintiffs now seek to attach to them. For it is manifest that the contract was made upon the theory of keeping the insured constantly interested in the protection and preservation of his property to the extent of one-half its value; that it was not understood or imagined that circumstances would or could arise under which the plaintiffs would be entitled to a heavier recovery in case of a partial than a total loss; and that, as respects this question, furniture and merchandise were placed in the same category and stood upon the same footing.

I have examined the case of *Ashland Mutual Fire Insurance Company v. Housinger*, 10 Ohio St. 10, and *Underhill v. Agawam Mutual Fire Insurance Company*, 6 Cush. 440. There is nothing in these cases in conflict with the views above expressed.

On the trial of this cause in the Circuit Court, the jury were instructed by the court, at the instance of the plaintiffs, upon the theory that by the terms of the policy the plaintiffs were entitled to recover the full amount insured (\$3,000), although his total loss was but \$3,859, and the total amount of goods on hand was only \$3,929; and instructions asked by the defendant, to the effect that the plaintiffs could recover only one-half the value of the goods on hand at the time of the fire, were refused. This action of the court we consider erroneous.

The judgment is therefore reversed and the cause remanded. The other judges concur.

Kennayde v. Pacific R.R. Co.

MARY KENNAYDE, Defendant in Error, v. PACIFIC RAILROAD  
COMPANY, Plaintiff in Error.

1. *Damages—Railroad companies—Negligence a question of fact for the jury.*—In a suit by the legal representatives of A. against a railroad company for damages caused by his death, the question whether the facts constituted such negligence as to render the company responsible was exclusively for the jury to determine.
2. *Practice, civil—Pleadings—Statute, how pleaded—Objections must be made in court below.*—It is only necessary for a party wishing to avail himself of a statute to state facts which bring his case within its provisions (Wagn. Stat. 1020, § 41), although according to the rules of good pleading he ought to refer to it. But all the circumstances essential to support the action must be alleged or in substance appear on the face of the petition. If the matter were defectively stated therein, objection should be raised in the court below, otherwise it can not be entertained.
3. *Railroads—Damages—Negligence of deceased must be the proximate cause of his death.*—It is incumbent upon railroad companies to exercise care and diligence; and unless the acts of a person killed by cars, were the direct and proximate cause of the disaster, the company will not be excused from liability.
4. *Railroad companies must sound bell in passing through cities.*—Under the statute (Wagn. Stat. p. 310, § 38), it is the imperative duty of railroad companies to sound the bell, and not merely the whistle of the locomotive, in passing through cities.
- ✓ 5. *Railroads—Damages—Negligence—What care in the company may be presumed.*—The citizen who, on a public highway, approaches a railroad track, and can neither see nor hear any indication of a moving train, is not chargeable with negligence for assuming that there is no car sufficiently near to make the crossing dangerous. He had a right to presume that in handling their cars the railroad companies will act with appropriate care, and that the usual signals of approach will be seasonably given, and that the managers of the trains will be attentive and vigilant.

*Error to First District Court.*

*Ewing, and Smith, for plaintiff in error.*

I. If an action is based upon a statute, public or private, there must be reference thereto in the petition. (Gen. Stat. 1865, p. 661, § 41; 1 Chit. Plead., 372; 2 Chit. Plead. 504–512; Walther v. Warner, 26 Mo. 147; Bayard v. Smith, 17 Wend. 88; Utica v. Richardson, 6 Hill, 300; People v. Barton, 6 Cow. 290; Morris v. People, 3 Denio, 81; Chipman v. Emeric, 5 Cal. 239; 10 Mass. 39; 11 Mass. 273; 7 Mass. 9; 1 Wis. 282.)

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II. The omissions that are made in the petition are fatal after verdict. (1 Chit. Plead. 373; 2 East, 333; 1 Maule & Sel. 500; Hann. & St. Jo. R.R. Co. v. Mahoney, 42 Mo. 467.)

III. The testimony disclosed that the deceased's own negligence contributed to his death, and hence there could be no recovery. (Redf. on Railways, 337, § 3; *id.* 332 §, 7; Brand v. Troy & Sch. Rail., 8 Barb. 368; Morrissey v. Wiggins Ferry Co., 43 Mo. 380; Liddy v. St. Louis R.R. Co., 40 Mo. 506.)

*H. B. Johnson*, for defendant in error.

I. The omission of defendant's employees to ring the bell, as required by the statute, or sound the whistle as the rules of the company required, was gross negligence. (Beisiegel v. N. Y. Central R.R. Co., 34 N. Y. 622; Ernst v. Hudson River R.R. Co., 35 N. Y. 9; Renick v. N. Y. Central R.R. Co., 36 N. Y. 132; Philadelphia & Trenton R.R. Co. v. Hagan *et al.*, 47 Penn. St. 244; Triplett v. Chicago, Burlington & Quincy R.R. Co., 38 Ill. 482; Brown v. N. Y. Central R.R. Co., 32 N. Y. 597; McGrath v. Hudson River R.R. Co., 32 Barb. 147; Newson v. N. Y. Central R.R. Co., 29 N. Y. 383; Ernst v. Hudson River R.R. Co., 39 N. Y. 61; O'Mara v. Hudson River R.R. Co., 38 N. Y. 445; Toledo, Peoria & Warsaw R.R. Co. v. Foster, 43 Ill. 415.)

II. When the negligence of defendant is clearly shown, and an accident has actually occurred, it is reasonable, *prima facie*, to refer it to the conduct of defendant's servants without requiring further proof. (Johnson v. Hudson River R.R. Co., 20 N. Y. 65; Milwaukee & Chicago R.R. Co. v. Hunter, 11 Wis. 160; Philadelphia & Trenton R.R. Co. v. Hagan, 47 Penn. St. 244; Augusta & Savannah R.R. Co. v. McElmurry, 24 Geo. 79; 2 Redfield on Railways, 200; Penn. R.R. Co. v. McTighe, 46 Penn. St. 316.)

III. Had deceased been slightly negligent, such negligence contributing only remotely to his destruction, and the gross negligence of defendant's employees being the immediate cause of it, plaintiff would still be entitled to recover. (Meyer v. Pacific R.R., 40 Mo. 156; Liddy v. St. Louis R.R. Co., 40 Mo. 506:



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Huelsenkamp v. Citizens Railway Co., 37 Mo. 537; Kennedy v. North Mo. R.R., 36 Mo. 351; Meyer v. People's Railway Co., 43 Mo. 523; Morrissey v. Wiggins Ferry Co., 43 Mo. 380.) The instructions given upon the part of the plaintiff were unobjectionable, and have been sanctioned by the courts of this State. (Schultz v. Pacific R.R. 36 Mo. 14-32; Gen. Stat. 1865, chap. 63, § 38.) The third instruction is proper. The law makes it the duty of the employees of a railroad to ring the bell. Negligence, even when gross, is but an omission of duty. It was important for the jury to know the duties of the parties, in order to judge of their negligence. (The Tonewanda R.R. Co. v. Munger, 5 Denio, 267; The N. Y. & New Haven R.R. Co., 1 Duer, 583; Cayzer v. Taylor, 10 Gray, 274.)

IV. The statute (Wagn. Stat. 310, § 38) is in the alternative, and it is the duty of the railroad to have and ring the bell as above stated, or to have a steam whistle. The instruction on this point misdirects the jury in this particular, and is cause of reversal. (30 Mo. 201; 38 Mo. 213.)

WAGNER, Judge, delivered the opinion of the court.

This was an action instituted by the plaintiff, the widow of Michael Kennayde, deceased, to recover damages for the killing of her husband, which was alleged to have been caused by the negligence, unskillfulness, and criminal intent of the officers, agents, servants, and employees of the defendant, whilst conducting, managing and running its locomotive and train of cars. The answer was simply a general denial. Trial by jury and verdict for plaintiff for five thousand dollars, the statutory penalty.

The facts are brief, and in substance these: That the employees of the defendant, between seven and eight o'clock of a very dark night in December, 1867, were backing a portion of a train near the depot, in the city of Kansas, where the railroad track runs along in the street, and at or very near where another street crosses the same. There were no lights in the rear of the train, no soundings of the whistle, as the rules of the company required, nor was the bell rung as the statute prescribes. There was no flagman at the crossing, nor any person to give notice of the



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approach of the cars. There were two tracks close together, and the train was backing on the switch, and struck some loose cars standing on the switch and drove them suddenly over Kennayde and killed him. Kennayde had been employed at work up in the city and his residence was on the other side of the track, and when last seen before the happening of the accident he was entirely sober.

Whether the facts constituted such negligence as to render the company responsible, was a matter exclusively for the jury to determine, and if the court did not mislead them by giving erroneous instructions the judgment must be affirmed.

But before proceeding to notice the instructions, we will examine a question which has been raised as to the sufficiency of the petition. It is contended that the petition is defective as a common-law pleading, and that it is not good under the statute. It is not necessary to notice the first objection, as it is admitted that at common law the action would not lie. It is beyond doubt that the pleader intended to found the action on the second section of the statute in reference to damages. He uses the exact words employed in the statute, giving a cause of action, sues in the name of the wife, and asks for the penalty given, in case of death, by that section.

The practice act declares that it shall not be necessary, in any pleading, to set forth any statute, public or private, or any special matter thereof; but it shall be sufficient for the party to allege therein that the act was done by the authority of such statute, or contrary to the provisions thereof, naming the subject-matter of such statute, or referring thereto, in some general terms, with convenient certainty. (2 Wagn. Stat., 1020, § 41.)

Although this petition does not charge that the act was committed contrary to the form of the statute, yet it does set out the facts which constituted it a statutory cause of action, and appears to have been framed expressly upon the statute. It is only necessary for the party seeking to avail himself of it to state facts which bring his case within the provisions of the statute, though according to the rules of good pleading he ought to refer to it. All the circumstances essential to support the action must be

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alleged, or in substance appear on the face of the declaration. (1 Saund. 135, *n* 3; 5 East, 244; Saund. Pl. and Ev., 830; 17 Wend. 88.)

In this case the facts and circumstances appear on the face of the petition. But if the matter was defectively stated in the petition the defendant should have made the point in the court below, and the objection now being raised for the first time can not be allowed.

At the instance of the plaintiff the court gave the jury three instructions. The first declared that if they believed from the evidence that Michael Kennayde was the husband of the plaintiff and that his death was occasioned by the negligence of any agent, officer, servant, or employee of defendant, whilst running, conducting and managing any locomotive, car, or train of cars, in Jackson county, then the jury should find for the plaintiff, and return a verdict for the sum of \$5,000, providing the suit was brought within six months from the time of his death.

The second instruction stated that the jury should determine from all the evidence, whether any agent, officer, servant, or employee of defendant, whilst running, conducting and managing any locomotive, car, or train of cars, failed to exercise the diligence, care and foresight of a prudent man, and the absence or want of such diligence, care and foresight would constitute such negligence as would render the defendant liable.

The third and last instruction, and the one most complained of, is as follows: "It is the duty of all railroads to have a bell on each locomotive engine, and to ring them at a distance of at least eighty rods from the place where the railroad shall cross any traveled or public road or street, and be kept ringing until it shall have crossed such road or street."

For the defendant the court gave two instructions. The first told the jury that unless they believed from the evidence that Michael Kennayde was killed by reason of the negligence or unskillfulness of the defendant, its agents, officers, servants, or employees, they should find for the defendant.

The second directed the jury, that if from the circumstances developed by the evidence they should find that the death of

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Michael Kennayde was occasioned in any manner by his own negligence, or that he contributed thereto by his own negligence, or that at the time of his death he failed to use proper care and precaution to protect himself from danger by reason of the passing of defendant's train, they should find for the defendant.

The defendant also asked a third instruction, that, unless the jury should find from the evidence that Kennayde was killed without any fault or negligence on his part, they should find for the defendant, which instruction was refused.

It is needless to comment with any particularity on the two first instructions given at the instance of the plaintiff, as they embody mainly the requirements of the statute, and are in substance the same as those given in the case of *Schultz v. Pacific Railroad* (36 Mo. 13), and which received the approbation of this court.

The first instruction given for the defendant made it obligatory on the jury to find as an affirmative fact that the killing took place by reason of the negligence or unskillfulness of the defendant, its agents, servants, or employees, before they could find for the plaintiff. This cast the whole *onus* or burden of proof on the plaintiff.

The second instruction was on the subject of contributory negligence, and asserted that if the deceased at the time of his death failed to use proper care and precaution to protect himself from danger, then the plaintiff could not recover. This instruction went further than the previous adjudications of this court warranted, and was as favorable as could have been given for the defendant. The third instruction refused was but a reiteration of the principle announced in the second, and was further objectionable in telling the jury that it was necessary to a recovery that the deceased should have been killed without any fault or negligence on his part. This ignored entirely the great leading and paramount rule that it was incumbent on the company to exercise care and diligence, and that unless the acts of the deceased were the direct and proximate cause of the disaster, the defendant would not be excused.

Upon the whole, the instructions, as noted above and given at

the request of each party, presented the law fairly, and were certainly sufficiently favorable to the defendant.

The third instruction given for the plaintiff tells the jury that it was the duty of all railroads to have a bell on each locomotive engine, and to ring the same at a distance of at least eighty rods from the place where the railroad should cross any traveled or public road or street, and be kept ringing until it shall have crossed such road or street. The statute provides that "a bell shall be placed on each locomotive engine and be rung at a distance of at least eighty rods from the place where the railroad shall cross any public traveled road or street, and be kept ringing until it shall have crossed such road or street; or a steam whistle shall be attached to each locomotive engine, and be sounded at least eighty rods from the place where the railroad shall cross any such road or street, except in cities," etc. (Wagn. Stat., p. 310, § 38.)

It is insisted here, in argument, that the obligation cast upon the company by the statute is in the alternative either to ring the bell or sound the whistle, and that the court was guilty of misdirection in declaring that it was its duty to have the bell rung, without mentioning the sounding of the whistle. But it is evident from the plain reading of the statute that no error was committed. It is made the imperative duty of the road to either ring the bell or sound the whistle, as it sees fit to use either one or the other, in all cases, except in cities—there the bell can be used only.

( The proof is clear and decisive that the whistle was not sounded, as the rules of the company prescribe, and the bell was not rung, as the statute requires. There was no light at the rear end of the car, and there was no one at the crossing to give the accustomed signals, warning footmen and travelers of the approaching danger. When the deceased passed on the crossing (on his way home, as may be reasonably supposed) he heard no signals, he saw no lights; everything was quiet, and he had a right to presume that he could pursue his course without danger.

( The citizen who, on a public highway, approaches a railway track, and can neither see nor hear any indication of a moving

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train, is not chargeable with negligence for assuming that there is no car sufficiently near to make the crossing dangerous. (Ernst v. Hudson River R.R. Co., 35 N. Y. 9.) He has a right to assume that in handling their cars, the railroad companies will act with appropriate care; that the usual signals of approach will be seasonably given, and that the managers of the train will be attentive and vigilant. In Newson v. New York Central R.R. Co., 29 N. Y. 390, Johnson, J., in delivering the opinion of the court, states the rule thus: "The law will never hold it imprudent in any one to act upon the presumption that another in his conduct will act in accordance with the rights and duties of both." In the case of Gordon v. Grand St. R.R. Co., 40 Barb. 550, the court says: "A defendant can not impute a want of vigilance to one injured by his act—as negligence—if that very want of vigilance were the consequence of an omission of duty on the part of the defendant."

In the case at bar, the defendant not only misled the deceased, by omitting all the usual and customary precautions to notify persons of the pending danger, but it acted in open and flagrant violation of the statute made for the protection of the public. The consequence of the omission was to put the victim off his guard, to disarm his vigilance, and lull him into a false sense of security. When the laws are broken and defied, and homicides are recklessly committed, it is no part of the business of courts to hunt up excuses or seize upon technicalities for the purpose of shielding the wrong-doers.

The unfortunate Kennayde had the same right to pursue his course that the defendant had to run the train on its track. The rights of the people of Kansas City to travel on and use their own streets and thoroughfares, are not inferior or subordinate to those of the railroad company. They each have a right to exercise their privileges in a lawful manner, and each are equally bound to use caution, care, and diligence to avoid accidents. The whole case was well submitted to the jury. They found Kennayde blameless, and the company negligent.

Let the judgment be affirmed. The other judges concur.

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State of Missouri, to use of Graham et al., v. Peacock, Adm'r, et al.

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STATE OF MISSOURI, TO USE OF SAMUEL M. GRAHAM *et al.*,  
Plaintiff in Error, v. WILLIAM PEACOCK, Adm'r, *et al.*,  
Defendants in Error.

1. *Sheriff—Commissioner required to give bond—Failure to give—Liability of on bond—Statute of limitations.*—An ex-county sheriff was appointed by the Circuit Court commissioner to loan out, for the benefit of a widow, certain money belonging to her which he had held for her in his capacity as sheriff and, as such commissioner, was directed to give bond, which he failed to do. In suit on his bond as sheriff, by the widow's heirs, for the money, *held*, that he was appointed commissioner on certain conditions which were not performed, and hence, that the appointment never took place; and that he became liable for the amount on his bond as sheriff; further, that his liability commenced immediately on the death of the widow, and was not barred till the lapse of three years thereafter.

*Error to First District Court.*

*Lay & Belch*, for plaintiffs in error.

——— for defendants in error.

BLISS, Judge, delivered the opinion of the court.

The relators are heirs of Charles Graham, deceased, and the suit is brought upon the official bond of B. F. Thompson, deceased, as sheriff of Jackson county. In 1854, upon petition for partition in the Circuit Court of said county, the sheriff was ordered to sell certain land belonging in part to the estate of said Charles Graham, and divide the proceeds according to the ascertained rights of the parties; and at the September term he reported that he had sold the same to E. F. Perry, one of the joint owners, for \$1,500, at a credit of twelve months. After paying the costs and expenses of the partition, it appears that \$703.57 of the purchase money belonged to said estate, which the sheriff collected, and that he paid over to the heirs two-thirds of the amount, retaining the sum of \$234.52 for the use of the widow. The record shows no further proceeding until the 15th of March, 1859, when the said Thompson, then ex-sheriff, was by the court appointed commissioner to loan out said money for the benefit of the widow during her life, and in the same order was directed to give bond



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as such commissioner in the sum of \$700. But he never gave the bond, and died without rendering any further account in regard to the money. The widow died October 20, 1863, when the relators, as surviving heirs of Charles Graham, became entitled to the money; and the petition in this cause was filed and the summons issued on the 6th of August, 1866. The defendants, who were securities upon the bond of Thompson, pleaded the statute of limitations, and raise the questions whether the money, at the death of Thompson, was in his hands as sheriff or as commissioner under the appointment of the court, and, if he held it as sheriff, when did the statute begin to run? To my mind it seems clear that the appointment of the late sheriff as commissioner never took effect; that it was conditional; that the condition was never performed, and the office never in fact created. It is unnecessary to consider whether, under the law existing when these proceedings were had, such commissioner could have been appointed, inasmuch as we hold that the conditions of his appointment were absolute, and that the deceased never changed his character from that of an ex-sheriff, completing the business under the act "in the same manner as if he continued to be sheriff," to that of a special commissioner under the appointment.

Holding, then, the money in his hands, received as sheriff, he and his securities are holden upon their bond "to account and pay over the same in the same manner as in cases of money collected on execution." (Sess. Acts 1845, p. 771, the same as Wagner's Stat. 971, § 35.) When, then, did the liability to these parties accrue? When had they first a right to demand and receive the money? The answer to these questions decides when the statute of limitations, whose protection the defendants claim, began to run. It appears that these heirs received of the \$703, immediately after the sale, all they were entitled to. The \$234 retained for the use of the widow was not theirs. The sheriff had no right to pay it to them or their guardian during her life, and their interest was only that of reversioners until the death of their mother. When that occurred, the money was absolutely theirs, and it was the duty of the holder to pay it over at once. Not doing

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so, a right of action accrued, and the statute began to run. This suit was commenced within three years after that time, and is not barred by the statute. (McNair v. Dodge, 7 Mo. 404; State v. Blackwell, 20 Mo. 97; Rabsahl v. Lack, 35 Mo. 316; Soulard v. St. Louis, 40 Mo. 144.)

The judgment of the District Court is reversed and the cause remanded. The other judges concur.

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WM. M. PARSONS, Defendant in Error, v. AGNES J. PARSONS,  
Plaintiff in Error.

1. *Practice, civil — Trial — Evidence — Deposition in former suit, when admissible — Privy of parties, etc.*—Suit in ejectment was brought by the son against the father, and the deposition of the latter was taken, full opportunity being given for cross-examination. Pending the trial the father died, and the suit was discontinued. Subsequently one involving the same issues was brought by the son against the father's widow, and his deposition filed in the latter suit. *Held*, that the deposition was admissible in evidence. To that end, complete identity of parties in the two actions was not required. It was sufficient that the defendants were in privity with each other. *Held, further*, that, there being no objection to the deposition on the ground of incompetency at the time it was taken, the subsequent decease of deponent would not, under the statute (2 Wagn. Stat. 1372, § 1), deprive the party of its benefit.
2. *Deeds — Delivery of with intent to invest title, effect of.*—A deed delivered by the grantor with the intent and purpose of vesting the title in the grantee, amounts to a substantial transfer of the estate, and no subsequent act can defeat it.

*Error to First District Court.*

T. Shackleford, for plaintiff in error.

I. The deposition of Isaac Parsons ought to have been admitted. The same subject-matter was in dispute, and there was a privity in the parties. (1 Greenl. Ev., §§ 553, 554; Cabanne *et al.* v. Walker, 31 Mo. 274; Jaccard *et al.* v. Anderson, 37 Mo. 91.)

II. The deposition can not be excluded under the statute. (2 Wagn. Stat. 1372, § 1; 44 Me. 21; 45 Me. 461; Green *et al.* v. Gould, 3 Allen, 465; Mathewson v. Estate of Sargeant, 36 Verm. 142.)

*Philips & Vest*, for defendant in error.

I. The deposition of Isaac Parsons, deceased, was properly excluded, for the reason that the deposition was taken in another suit between different parties, and involving different issues. The appellant was not privy, in law, estate, or blood, to her deceased husband. (2 Coke on Littleton, 597 ; 1 Washb. on Real Prop. 138, note 2.)

II. The deposition was properly excluded, because the court below had excluded the testimony of plaintiff, for the reason that Isaac Parsons, the other party to the transaction, was dead ; and if the court had then admitted the deposition of the deceased party, the object and intention of our statute would be defeated. (2 Wagn. Stat. 1372, § 1.) Whilst the statute properly excludes the living party as a witness, it surely does not mean to do him the injustice of sealing his mouth, and then admitting the testimony of the other party because dead.

WAGNER, Judge, delivered the opinion of the court.

Ejectment tried in the Saline Circuit Court for the recovery of a tract of land, where plaintiff had judgment, which was affirmed on appeal in the District Court. The main point presented for consideration here is the action of the court in its rulings as to the admissibility of testimony, though exceptions are also taken in reference to the instructions.

The action was against Agnes, the widow of Isaac Parsons, deceased ; and the plaintiff, who was the son of Isaac, claimed the premises by virtue of a deed, which he alleged was executed and delivered to him by the deceased in his lifetime. A prior suit was commenced by this plaintiff against his father Isaac, when living, and, in that suit, Isaac's deposition was taken in his own behalf. During the pendency of the suit the defendant Isaac died, and it was discontinued, and it is now again brought for the same land, against the widow in possession, who claims title under a conveyance from her deceased husband.

On the trial of the cause, the deposition of the deceased party and witness was offered in evidence on the part of the defendant,

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and the plaintiff objected to its reception. The objection was sustained, and it was ruled out. The deposition, with the record in the prior suit, had been filed in the pending action.

It has long been held in this State that depositions taken in a former suit between the same parties, may be read in evidence, unless there be other objections than that of having been taken in the former suit. (Tindall v. Johnson, 4 Mo. 113.) But if a party wishes to avail himself of it as evidence, he should either file it in the suit, or give the opposite party notice that he intends to use it. (Samuel v. Withers, 16 Mo. 532; see, however, Cabanne v. Walker, 31 Mo. 214.) And the testimony of deceased witness at a former trial of a case is admissible in evidence, if the same issues are presented, and his testimony was directed to the issues, thus giving an opportunity for cross-examination. (Jaccard v. Anderson, 37 Mo. 91.)

As to the issues being the same in this action with the previous one instituted by the plaintiff against Isaac Parsons, there is no doubt, and the record shows that full opportunity was afforded by the plaintiff for cross-examination. But it is insisted that the parties were not the same, and therefore the evidence was inadmissible. Mr. Greenleaf says "that in regard to the admissibility of a former judgment in evidence, it is generally necessary that there be a perfect mutuality between the parties — neither being concluded, unless both are alike bound. But with respect to depositions, though this rule is admitted in its general principle, it is applied with more latitude of discretion, and complete mutuality or identity of all parties is not required. It is generally deemed sufficient if the matters in issue were the same in both cases, and the party against whom the deposition is offered had full power to cross-examine the witness." (1 Greenl. on Ev., § 553.) In the case of judgments the rule does not apply exclusively to the parties of record, but extends to all those who are in privity with them. Therefore, all privies, whether in estate, in blood, or in law, would be estopped from disputing whatever was conclusive upon him with whom they were in privity. Now, here the privity sufficiently exists, and, if there be no other objection, the deposition should have been admitted.

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But it is further objected that the deposition was not admissible under the statute making parties witnesses. By the statute it is enacted that no person shall be disqualified as a witness in any civil suit or proceeding at law or in equity by reason of his interest in the event of the same, as a party or otherwise, but such interest may be shown for the purpose of affecting his credibility; *provided*, that in actions where one of the original parties to the contract or cause of action in issue and on trial is dead, or is shown to the court to be insane, the other party shall not be admitted to testify in his own favor. (2 Wagn. Stat. 1372, § 1.) This statute, while it destroyed the disabilities under which parties to the record were placed by the common-law rule, was designed to put them on an equality; and hence, if either party died or became insane, the other party was rendered incompetent because he could not be opposed by the only person who was capable of meeting and rebutting his testimony. Where the disability is raised by the statute, it supposes a total disqualification at the time of trial, or when the evidence is taken. But it is not intended to exclude evidence which was admissible and competent at the time it was given. If there was no objection to the deposition, on the ground of incompetency, at the time it was taken, the subsequent decease of the witness could not deprive the party of its benefit. In Vermont, on a statute similar to ours, it has been held that in a suit against the representatives of a deceased person, evidence introduced to show what such deceased person testified to in a suit against him in his lifetime for substantially the same cause of action, and which was terminated by the death of the defendant, is admissible, notwithstanding his widow had become a competent witness by his death. (*Mathewson v. Sargeant*, 36 Verm. 142.) I think, therefore, that the court erred in sustaining the objection, and that the deposition should have been admitted.

The whole question in the case turned upon the delivery of the deed by Isaac Parsons to the plaintiff. If the deed was delivered by the grantor with the intent and purpose of vesting the title in the grantee, it amounted to a complete transfer of the estate, and no subsequent act could defeat it. A valid deed, once delivered,

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has the effect of vesting the title in the grantee, and although it may be afterward destroyed, or come into the possession of the grantor, it will not operate as a revestiture of title. When once delivered it can only be defeated by virtue of some condition contained in the deed itself. Whether there was such a delivery was a fact to be submitted to and determined by the jury. The first instruction given to the jury at the instance of the plaintiff, and numbered two in the series was faulty. It confined the question too much to an isolated fact, proved by a single witness, without paying sufficient regard to other evidence in the case. It is true this was partially remedied by instructions given on the other side, but not wholly so. But as the case will go back, this objection can be obviated on another trial. Whether the deed from Isaac Parsons to his wife Agnes, the defendant in this case, was legal and imparted any title need not be noticed now, as it can not be passed upon in this proceeding. The action was ejectment, and the plaintiff must recover upon the strength of his own title. If he shows the deed valid under which he claims, and that there was a delivery, that at once annihilates the defendant's title. If he fails in this, it is immaterial, so far as this action is concerned, what may be the defendant's estate.

The judgment will be reversed and the cause remanded for a new trial in conformity with this opinion. The other judges concur.

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STATE *ex rel.* COLLINS, KELLOGG & KIRBY, Plaintiffs in Error,  
v. G. H. DULLE *et al.*, Defendants in Error.

1. *Administrator — Bond of — Suit on — Allegations — Breaches — Verdict, arrest of.*—In a suit on an administrator's bond, where the petitioner set out several distinct breaches, a verdict for an entire and gross sum is erroneous, and furnishes a sufficient ground for arrest of judgment, on motion.
2. *Administrator de bonis non — Must sue for the assets — Creditors can not sue for them.*—When an administrator dies, the administrator *de bonis non* is the proper person to sue for the assets belonging to the estate, and a creditor of the estate will not be permitted to sue for his entire debt on the bond of the deceased administrator. Such a course would lead to confusion, and destroy and practically annul the statutory provisions concerning priorities and classifications.



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*Error to First District Court.*

*Ewing & Smith*, and *G. F. White*, for plaintiffs in error.

I. Any one injured may sue on the bond for waste. (Gen. Stat. 1865, p. 531, § 9; *Oliver v. Crawford*, 1 Mo. 188; *State v. Chouteau*, 1 Mo. 524-8; 3 Mo. 127; *Morrison v. St. Gemme*, 23 Mo. 344 *et seq.*; *Adams v. Campbell*, 10 Mo. 724; *Oldam v. Trimble*, 15 Mo. 225, 228; *Coman v. Mardell*, 15 Mo. 424.)

II. The petition showing on its face a cause of action, a motion in arrest is not the mode of reaching an objection to the capacity of plaintiff to sue. (Gen. Stat., 1865, p. 684, § 7; *Jackson v. Anderson*, 32 Mo. 118; *Welch v. Bryan*, 28 Mo. 30; *Jones v. Stille*, 36 Mo. 324; *Wood v. Mann*, 1 Sumn. 500.) There is really but one demand in this case—one allegation of waste—and after that was established by proof, the different demands upon which plaintiffs seek to recover would come in like items in an account, and they all, in fact, constitute but one cause of action. (*State, to the use, &c. v. Davis et al.*, 5 Mo. 406.)

*Lay & Belch*, for defendants in error.

The plaintiffs can not maintain this suit. The administrator *de bonis non* was the party to sue. (R. C. 1855, §§ 45-7, pp. 120, 121; 35 Mo. 323; 15 Mo. 490; 9 Mo. 356.) It was not the intention of the Legislature, that all the creditors of an estate, and the administrator also, should commence suit and carry them on simultaneously. Several distinct breaches are assigned and there is a general verdict. (*State v. Ruggles*, 20 Mo. 99.)

WAGNER, Judge, delivered the opinion of the court.

From the record it appears that B. Bruns administered on the estate of Grisberg, deceased, and that Barrett and Dulle were his securities on the administration bond. The plaintiffs had a demand against the estate, which was regularly proved up and classified. The plaintiffs had a demand against the estate. They were also the assignees of several other demands. Bruns made his first annual settlement, showing assets in his hands to a con-

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siderable amount, which were liable to the claims of creditors, and subsequently died without making distribution. Letters of administration *de bonis non* were granted on the estate of Grisberg, but the assets of which Bruns died possessed were not paid over to the succeeding administrator. The plaintiffs commenced suit in the Cole County Circuit Court against the securities on the administrator's bond of Bruns, deceased, and assigned several distinct breaches.

The jury returned a general verdict for the plaintiffs, and assessed their damages in one entire sum. Upon this verdict judgment was rendered, and the defendants moved in arrest, which motion being overruled, they carried the case to the District Court, where the judgment of the Circuit Court was reversed, and the plaintiffs have now brought error.

Several questions have been argued in this Court, only two of which we deem it necessary to notice: First, as to the validity of the verdict, and second, whether the action is maintainable. The petition on the bond set out ten distinct breaches, and the verdict was for an entire and gross sum. On such a verdict it is impossible for the court to know how the issues were formed, on which of the breaches the damages were assessed, and how much on each one. This practice is erroneous, and furnished a sufficient ground for arresting the judgment. (Mooney v. Kennett, 19 Mo. 551; Clark's Adm'r v. Hann. & St. Jo. R.R. Co., 36 Mo. 215; Pitts v. Frigate, 41 Mo. 405.) The next question presented by the record is whether it was competent for the plaintiff to maintain this action.

By the statutes of this State it is provided that if all the executors or administrators of an estate die or resign, or their letters be revoked, in cases not otherwise provided for, letters of administration on the goods unadministered shall be granted to those to whom administration would have been granted if the original letters had not been obtained, or the persons obtaining them had renounced the administration; and the administrators shall perform like duties and incur the like liabilities as the former executor or administrator.

The statute further declares that if any executor or administrator

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die, resign, or his letters be revoked, he or his legal representatives shall account for, pay and deliver to his successor, or to the surviving or remaining executor or administrator, all money, real and personal property of every kind, and all rights, credits, deeds, evidences of debt, and such papers of every kind of the deceased, at such times and in such manner as the court shall order, on final settlement with such executor or administrator or his legal representatives. (1 Wagn. Stat. 77, §§ 46-47.)

It will be perceived that the statute contemplates that the succeeding administrator shall stand in the exact attitude of his predecessor; that he should perform the same duties and incur the same liabilities—that is, that he shall reduce the assets belonging to the estate to possession, and make distribution when legally authorized so to do.

In order to make a full and complete adjustment of the affairs pertaining to an estate, under the administration law, it is necessary that the administrator should have control of all the assets. There is no other way by which they can be legally distributed. They must be reduced into his possession and come into his hands before he can ascertain to what class they can be applied, or in what proportion the claims in any given class can be paid off. But if a creditor can commence proceedings on the bond in the manner here contended for, he may recover the whole of his claim when legally the class to which it belongs may be entitled to only a small per centage. Or he may recover when there are demands enough proved and allowed in a prior class to absorb the whole estate, thus defeating the whole policy of the administration law and going in direct opposition to the statute.

When an administrator dies or resigns, or his letters are revoked, his successor in office, the administrator *de bonis non*, is the proper person to sue for, recover, and take charge of all the assets, of whatever description, belonging to the estate; he is thenceforth accountable, and it is to him that the creditors must look. Any other course would lead to confusion, and destroy and practically annul the statutory provisions concerning priorities and classification.

The question is not new in this court; it has been previously

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raised, and always decided in the same way. In the case of *The State, to use, etc., v. Hunter et al.*, 15 Mo. 490, Judge Scott pertinently remarks: "How could there be an apportionment of the assets among creditors in the same degree if one creditor was allowed to sue on the bond of the first administrator and recover his entire debt?" So, in *State, to use, etc., v. Fulton et al.*, 35 Mo. 323, it was expressly held that where the administrator dies or is removed before final settlement, the administrator *de bonis non* can alone sue for the assets unadministered.

I am satisfied that the judgment of the District Court reversing the judgment of the Circuit Court was correct, and I therefore advise an affirmance.

Judgment affirmed. The other judges concur.

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JAMES C. MEDSKER, Defendant in Error, v. JAMES SWANEY *et al.*, Plaintiffs in Error.

1. *Mortgages — Mortgagor may become purchaser, when.*—Where the mortgagor is privy to the sale of the mortgaged property, assents to the acquisition of title by the mortgagee, and afterward concurs in it, and there is no suspicion of fraudulent practice, the mortgagee may become the purchaser at his own sale, and the mere fact that at the time of the purchase he stipulates with the mortgagor for a re-acquisition of the property on repayment of the purchase money, will not, in the absence of proof showing an intention to that effect, remit the parties to their original relation as mortgagor and mortgagee. In such case, the mortgagor could not, after slumbering in his rights for five years, enforce such stipulation in an action of ejectment.
2. *Fraud — Mortgage sale — Verbal agreement by mortgagor to reconvey — Effect of, as fraud in fact.*—Although in case of purchase by the mortgagee of mortgaged property, a mere verbal agreement by him to reconvey, or being reimbursed his advance, as a contract, would be invalid, as being within the statute of frauds; yet a refusal to convey within a year, or within a reasonable time, if that was the understanding, on being tendered his money, may be, in the absence of a satisfactory explanation, sufficient evidence of fraud in fact to set aside the conveyance and admit the mortgagor to his right of redemption.

*Error to First District Court.*

*Trefren, Black & Sheffield, and Slairns*, for plaintiffs in error.

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I. McNees must show himself in a condition to demand a reconveyance of the property according to the terms of the agreement within a reasonable time. Five years is not within a reasonable time. (4 Seld. 219; McNew v. Booth, 42 Mo. 189; 8 Paige, 257; 14 Pick. 467; 4 Denio, 495; 1 Littell, 190-1; Mackelreth v. Fox, 1 Lead. Cas. in Eq. 150, and notes; 6 Hill, 219.)

II. A mortgagee may become the purchaser of the equity of redemption, with the assent of the mortgagor, at his own sale. The pleadings admit that Swaney purchased through Hayden, with the express assent of McNees and with his full knowledge and agreement thereto. The sale can not be set aside on that account. (Hendricks v. Robinson, 2 Johns. Ch. 283, 311; McNair v. Biddle, 8 Mo. 257; 7 Iowa, 60; 4 Blackf. 339.)

III. McNees having been present at the sale, instrumental in causing it to be made, assenting to the same, standing by and permitting the property to be improved and grow in value, is now estopped from denying its regularity. (5 Ala. 427; 2 Law Reg., new series, 730.)

*Gage & Ladd*, for defendant in error

I. The interest of McNees in the mortgaged property before the sale was an equity of redemption, and was not foreclosed by it. The sale was voidable, and properly set aside. The purchase by the mortgagee was fraudulent and void. (Thornton v. Irwin *et al.*, 43 Mo. 153; Fox v. Macreath, 2 Bro. C. C. 400; Davore v. Fanning, 2 Johns. Ch. 252; 1 Lead. Cas. in Eq. 92.)

II. The agreement between McNees and Swaney was at best an agreement to clog the equity of redemption made between mortgagor and mortgagee, and, as such, is void; and if the sale stands upon that agreement, the sale itself is void. (Perkins v. Drye, 3 Dana, 170; Clark v. Henry, 2 Conn. 327; Wharf v. Howell and Wife, 5 Binn. 399; Johnston v. Gray, 16 Serg. & R. 365; Jacques v. Miks, 7 Wend. 261.)

III. The notice of the sale was insufficient, and the sale liable to be set aside for that cause alone. (Beattie v. Butler, 21 Mo. 313.)

CURRIER, Judge, delivered the opinion of the court.

This is a petition in equity to set aside certain conveyances, and for permission to redeem. The suit was originally instituted by John C. McNees, who subsequently sold out his interest in the suit and cause of action to the present plaintiff, who was thereupon substituted in the place of the original plaintiff.

It appears from the record that McNees, on the 20th of June, 1860, mortgaged the disputed premises to the defendant, Swaney, to secure the payment of the former's promissory note of that date for \$1,450, payable twelve months after date, with ten per cent. interest. The deed of mortgage clothed the mortgagee with a power of sale. Under this power, default having been made in the payment of the note, the mortgagee proceeded to advertise and sell the mortgaged premises. They were sold on the 27th day of May, 1862, and one Hayden became the purchaser thereof at the sum of \$1,739 88, being the exact amount then due on said note. A deed was made to him accordingly in due form, and he, on the same day, re-deeded the premises to Swaney, the mortgagee. Hayden had no interest in the transaction, and paid nothing, but acted throughout as the agent of Swaney, or perhaps as the agent both of Swaney and McNees; for it had previously been agreed between these parties that, if the property did not sell for more than the mortgaged debt, Hayden should bid it in on Swaney's account, and he did so. Thus far there is no dispute about the facts.

The petition, which was filed May 2, 1868, some six years after said sale, is framed upon the theory that the sale, on the part of Swaney, was fraudulent in fact, and various allegations are made in support of that view.

The answer denies all fraud, and alleges that the sale was made, and the title vested in Swaney, with the full knowledge and consent of McNees; that the mortgage debt was thereby extinguished, and the title to the mortgaged property vested in Swaney absolutely, in accordance with the understanding and agreement of the parties. The plaintiff's replication admits the existence of the alleged understanding, but avers that the arrange-



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ment included the further stipulation that Swaney should hold the property subject to redemption—that is, that he should reconvey to McNees on being reimbursed the amount of the mortgage debt.

The state of the plaintiff's pleadings is peculiar, but it is not necessary to enter into an examination of them, since upon the whole case, we are of the opinion that he fails to show adequate ground for equitable relief.

The theory upon which the petition was framed—namely: fraud in fact—is abandoned, and a recovery is now sought upon other grounds. It is insisted that the mortgagee could not purchase at his own sale, either directly or through a third party, however upright his conduct; and that if he could do so with the mortgagor's assent, still the stipulation for redemption, as set out in the replication, vitiated the whole transaction.

The general rule on this subject undoubtedly is that a trustee can not, as against his *cestui que trust*, acquire the title to the trust property at his own sale, whether acting directly or through the intervention of a third party; and a mortgagee, with a power of sale, is regarded as a trustee. But a mortgagee with such power is not only a trustee; he is also a *cestui que trust*, and his interest as such may absorb the whole estate. It is pledged to him for his protection, and his security might be greatly impaired or sacrificed at such sale, if he were not permitted, under any circumstances, to become a purchaser. It has been held, therefore, that where the mortgagor was privy to the sale, assented to it, and to the acquisition of title by the mortgagee, and concurred in that result after it was reached, and there was no suspicion of fraudulent practices, the mortgagee might purchase at his own sale. And why not? The mortgagor could at any time part with his equity and convey it to the mortgagee by a private sale and transfer. No substantial reason is perceived why the same results might not, and with equal propriety, be reached through the medium of a public sale under the mortgage, the mortgagor assenting thereto.

In Texas it has been held that a mortgagee, with a power of sale, may purchase at his own sale, through a third party, and

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that such sale is not subject to impeachment in the absence of any proof of unfairness, attempt to stifle competition, or other fraudulent acts. (The Howards v. Davis, 6 Tex. 174.) It has also been decided in New York that a mortgagee, holding a power of attorney from the mortgagor, may sell and convey, through a third party, to himself, provided he acts therein with the knowledge and concurrence of the mortgagor. (Dobson v. Racy, 4 Seld. 216; and see Ives v. Ashley, 97 Mass. 198.) A mortgagee selling under a power of attorney, as in the case above cited, and a mortgagee acting under a power of sale incorporated in the mortgage, stand on the same footing. In the latter case, the mortgage deed itself is treated as a power of attorney. (1 Hill. on Mort. 129.)

In the case at bar, the mortgagor's consent to the transaction now sought to be overthrown, is admitted by the pleadings, and is abundantly shown by the proofs. But it is urged that while it is true that the mortgagor was present at the sale, and was fully conversant with all its circumstances and incidents, and gave his assent to all that was done, confirming the conveyance to the mortgagee, still it is also true that he at the same time stipulated with the mortgagee for a re-acquisition of the property, and that this stipulation remits the parties to their original relations as mortgagor and mortgagee.

The stipulation is not, in my opinion, necessarily attended with the consequences attempted to be attributed to it. The evidence makes it clear that no such result was intended or contemplated by the parties. The times were unpropitious, and McNees was in no condition to meet his liabilities. The mortgage debt was long past due, and it was arranged between the parties that a sale should be had, and that Swaney, through Hayden, should bid up the property to the amount of his claim, and that, if there was no better bid he should take the absolute title and give McNees an opportunity to re-acquire it, if the latter should be able to do so, and at the amount of Swaney's investment therein. In pursuance of this arrangement, the property was sold at the exact sum due Swaney, the mortgage canceled, and McNees' note surrendered to him as paid. This shows conclusively that the rela-

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tion of debtor and creditor, mortgagor and mortgagee, was not intended to be continued; that the debt was to be regarded as extinguished, and that McNees, in the view of the parties was to re-acquire the property, if he did so at all, in the character of a purchaser, and not in the way of paying up an unextinguished and continuing indebtedness. McNees, indeed, testifies that the note was not given up; that he remembers nothing about the note; that he does not remember ever having given it. This testimony, when compared with the allegations of the petition, is not calculated to inspire confidence in its reliability. That a note was given, and that it was surrendered as satisfied on the day of the sale, the evidence sufficiently shows.

There is a conflict in the evidence as to the time granted by the stipulation to McNees, in which he might repossess himself of the property. Swaney testifies that it was one year from the date of sale, and so the evidence preponderates, and so McNees, according to the testimony of a witness who appears reliable, stated the fact to be, although he testified differently in court, claiming that no time was named or limited. If that were so, then a reasonable time would be implied, and that period certainly elapsed long enough before these proceedings were commenced. The evidence shows that Swaney took possession of the property in a year, or thereabouts, after the sale, and that he has since made valuable improvements upon it—McNees, in the meanwhile, and for some five years, sleeping upon his alleged rights. In any view of the subject, he has waited too long to have his pretensions favorably considered at this late day.

Swaney's mere verbal agreement to convey, on being reimbursed his advances, as a contract, was doubtless invalid, as being within the statute of frauds. But a refusal to convey within the year, or within a reasonable time—if that was the understanding—on being tendered his money, would have been, in the absence of satisfactory explanation, irresistible evidence of fraud in fact in his management of the mortgage sale, and would, therefore, entitle the other party to relief on that ground. But no money has been tendered him at any time, so far as the evidence shows; but it appears that some twelve or fourteen months after the sale,

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Swaney offered to convey the premises to McNees, on being reimbursed the amount of money he had invested therein. At that time it was doubtful whether the property could be sold for more than Swaney had paid for it, although it was regarded as intrinsically worth much more. There was then, as the evidence shows, no sale for such property in Kansas City, and that had been the condition of things for some time.

But it is further objected that the mortgage sale was invalid because of the supposed indefiniteness and insufficiency of the notice. The premises were advertised to be sold on Monday, the 27th day of May, 1862, but the sale took place on Tuesday, the 27th day of May—on the same day of the month stated in the notice, but on a different day of the week. It is sufficient to say, in answer to this objection, that McNees was cognizant of the whole matter; that he was present at the sale, assenting to it and to all that was done, and could not, therefore, have been deceived or misled by the inadvertence, and he is consequently not in a position to complain of it.

Our conclusion upon the whole case is this: that the transactions under review are tainted with no fraud or unfairness on the part of Swaney; that the surrender and cancellation of the note and mortgage, coupled with McNees' consent to, and participation in, the acts and transactions which led thereto, including the acquisition of title to the mortgaged premises, through the medium of the mortgage sale and subsequent conveyances, operated to extinguish alike the mortgage debt and the mortgagor's right of redemption; and that this result is not defeated by means of Swaney's stipulation to re-convey, within the time and upon the conditions stated, although a refusal by him to carry out this part of the arrangement, had such refusal appeared, might well be considered such evidence of fraud and circumvention as to warrant the setting aside of the conveyances and the admission of the mortgagor to the right of redemption.

These conclusions lead to a reversal of the judgment and the remanding of the cause. The other judges concur.

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FINIS McCLANAHAN, Defendant in Error, v. LEONARD SCHRICKER  
*et al.*, Plaintiffs in Error.

1. *Damages — Sale of land — Easement — Right of way — Clause of deed in restraint of alienation, etc.*— A. sold B. a certain tract of land lying within his own, but communicating with a public highway through a gate in the fence inclosing the land of A. The deed of purchase declared that the fence was “not to be disturbed without the permission” of A. A mere verbal statement by A. to B. of an intention to open a street from the land sold to the highway, without proof of any inducement to such statement, would not render A. liable to B. in damages, for failure to open the street. The clause in the deed was in no way a restraint of alienation, and was a valid provision

*Error to First District Court.*

*King Brothers*, for plaintiffs in error.

*Gordon*, and *Draffin*, for defendant in error.

CURRIER, Judge, delivered the opinion of the court

The plaintiff's counsel have stated and argued this case as though it were an action of tort for obstructing the plaintiff's right of way over the defendants' lands. That view of the case presents a misconception of the true character of the suit. The petition counts upon a cause of action sounding in contract, and not in tort. It recites, in the way of inducement, various matters, and then proceeds to allege “that at the time the plaintiff purchased the lot (mentioned in the recital), the defendants then and there agreed with the plaintiff, in consideration of his purchase of said lot, and paying for the same the sum of \$100, that they would open the said Anglaize avenue (mentioned in the recital) from said lot out to Cooper street, in the town of Tipton, in the fall of the year 1867, thereby giving the plaintiff a right of way, and an easement forever, from said lot to Tipton and the public streets therein.” It is then alleged that the plaintiff has performed all the stipulations of the agreement obligatory upon him, but that the “defendants wholly failed and refused, and still fail and refuse to open said street, or to give to the plaintiff the easement or right of way which they had agreed to do,” whereby it is further averred, the plaintiff has been much inconvenienced

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and subjected to expense, for which he prays judgment in the way of damages.

It is thus seen that the plaintiff claims damages for the breach of an alleged agreement to open a street, and not for a wrongful obstruction of his right of way. The petition is framed upon the theory that no right of way existed at the time the suit was brought. The allegation is that the defendants agreed to open the street and "thereby give the plaintiff a right of way" to the boundary of defendant's lands, adjoining the town of Tipton: It is for a breach of this alleged agreement that the plaintiff sues.

At the trial, on the conclusion of the testimony, the defendants asked an instruction to the effect that, upon the whole case, the plaintiff was not entitled to recover. This instruction ought to have been given, but the court refused it.

The plaintiff testified that, "at the time of the purchase, the defendant Schricker told him that the streets would be opened up in the fall, and the fence removed;" and also that Schricker, subsequently to the execution and delivery of the deed, again told him that when the plaintiff got ready to move, he (Schricker) would "remove the fence and open the street." The plaintiff was corroborated on these points, but there was no other testimony having any tendency to prove the making of the alleged agreement; nor was there any testimony to show on what inducement Schricker made to the plaintiff these statements, or that the statements were anything more than Schricker's voluntary declarations of what it was his intention to do; nor was there any evidence that Habicht, the other defendant, was in any way a party to these declarations.

The defendants' deed, conveying the lot to the plaintiff, was read in evidence. The suit, however, is not based on that deed, but upon an alleged agreement *de hors* the deed. The deed has no direct bearing upon the present litigation, except in the way of inducement to the supposed verbal contract.

That the plaintiff has a right of way over the contemplated avenue (Anglaize) does not seem to be controverted by the defendants. The plaintiff testifies that he has, in fact, enjoyed and used such way from the beginning—going out and in at



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pleasure, meeting no other obstruction than a gate, which the defendants placed in the fence to facilitate that use without removing their fence and exposing their field. The plaintiff's land is described in the deed as bounded on one of its sides by "Anglaize avenue," which existed alone on paper; that is, on an unrecorded plat of defendants' ground. But, assuming that the deed, in virtue of such description, and other facts occurring at the purchase, secured to the plaintiff the supposed right of way, which does not seem to be disputed, it does not thence follow that the defendants might not do just what they have done, namely: protect their field by a gate placed in the fence, which would at the same time, as compared with an unbroken fence, facilitate the plaintiff's means of ingress and egress from his own grounds; for the deed expressly declares that "the fence is not to be disturbed without the permission" of the defendants. If this provision refers to the fence crossing what is called "Anglaize avenue," we see no sufficient reason why it should not have effect and determine the rights of the parties to the extent of permitting a continuance of the gate. The clause is in no way a restraint of alienation, as was the provision of the deed considered in *McDowell v. Brown*, 21 Mo. 57. It simply defines the rights of the parties as respects the use and continuance of a boundary fence, in connection with the grant of a private right of way and the mode of its enjoyment. There can be no doubt of the validity of such a provision. If the defendants deceived the plaintiff in the sale of the land, and perpetrated a fraud upon him, that is quite another matter. But that question does not arise under the pleadings in this suit; nor do we wish to be understood as suggesting a suspicion of any unfairness in the transaction.

With the concurrence of the other judges, the judgment will be reversed and the cause remanded.

SAMUEL M. WILSON, Petitioner, v. WILLIAM BERKSTRESSER and  
THERON M. RICE, Judge First Judicial Circuit

1. *County roads—Proceedings to obtain change of road must contain what.*—Persons wishing for a change in a county road can only apply for it, under the statute (Wagn. Stat. 1229, §§ 56-58), by a petition showing a wish to cultivate their land, by proof of notice, and procurement of written consent from the person upon whom they would turn the road. If they wish a new road, under sections 49 and 53, p. 1228, the width of the road should be fixed, and the "intermediate points," on the road should be specified, and the damage should be assessed, by a jury before the proceedings were determined; and the assessment of damages in favor of one whose property was taken for the road, after the final action of the court, is altogether irregular, and creates no debt.
2. *Mandamus—Jurisdiction of Circuit Courts by, over County Courts—Roads—Assessment of damages.*—In the matter of paying damages assessed for the right of way on a public road, Circuit Courts have jurisdiction over the County Court by *mandamus*, and in a proper case may issue the writ; and a writ of prohibition will not issue to prevent its erroneous exercise.

*Petition for writ of prohibition.*

Johnson & Budd, for petitioner.

I. The office of prohibition is to prevent courts from going beyond their jurisdiction in the exercise of judicial power. (3 Blackst. Com. 112, 113; Thomas v. Mead, 36 Mo. 232; State *ex rel.* West *et al.* v. Clerk County Court *et al.*, 41 Mo. 44; Vitt v. Owens *et al.*, 42 Mo. 512.)

II. The whole subject of establishing, changing, and vacating public roads is placed under the exclusive jurisdiction of the County Court, and a *mandamus* will not lie from the Circuit Court. (County Court v. Round Prairie Township, 10 Mo. 679; Vitt v. Owens *et al.*, 42 Mo. 514.)

BLISS, Judge, delivered the opinion of the court.

The plaintiff, as president judge of the County Court of Morgan county, sued out an alternative writ of prohibition, returnable at this term, and, in his petition, charges that the said Rice, as circuit judge of said county, at the suit of said Berkstresser, had issued his writ of *mandamus* against the justices of the said County Court, commanding them to allow the said Berkstresser the sum of

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eighty-five dollars, and to draw a warrant for the amount upon the county treasurer. It appears that certain parties had presented to the County Court a road petition, of which the following is a copy: "The undersigned householders of Moreau and Haw Creek townships, Morgan county, Missouri, respectfully petition your honorable court to change the State road leading from Versailles to Georgetown, as follows: commencing at or near where said road crosses the first branch of Moreau creek, thence to Marple's dam." No papers were filed with the petition, but the County Court made an order upon the road commissioners to view and locate the road, take the right of way, ascertain the cost, and report at the next term of the court. The commissioners accordingly recommended the change, reported the survey of the new road, and that all the persons whose land it crossed had released the right of way, except Wm. Berkstresser, to whom they assessed five dollars as his damage. The court accepted the report, ordered the petitioners to pay the damages, and, upon proof that the five dollars had been tendered, ordered the road to be opened and the overseer to take immediate possession. The record shows that at the next term a jury trial was had in the County Court, by consent, and that said Berkstresser obtained a verdict of eighty-five dollars for the right of way over his land, and it does not appear that any further proceedings were had in the County Court.

In February, 1869, defendant Berkstresser sued out of the Circuit Court the alternative writ of *mandamus*, above spoken of, which was made peremptory at the May term. The plaintiff asks for the writ of prohibition upon the ground that the Circuit Court exceeded its jurisdiction in its *mandamus* proceedings and in their manifest error. It is very clear that the proceedings in the County Court to change the road, or for a new road, did not comply with the law. It is difficult to tell under which provisions of the statute the petitioners acted. They say that they wish a change in the road, and if that is their object, they could only apply for the change under the provisions of sections 56, 57, and 58, p. 1229, Wagn. Stat. But they have not complied with these sections; for it is not the petition of a person wishing to cultivate his land—no notice appears, and there is no written consent

from the persons upon whom he would turn the road. They are equally unfortunate if their object be a new road, under the provisions of sections 49, etc., p. 1228; for, in addition to the want of notice, the width of the road is not fixed. The petition does not specify the "intermediate points on the road;" nor was there any assessment of damages by a jury until after all the proceedings were determined. It was the duty of Berkstresser, if dissatisfied with the award of the commissioners, to demand at once, under the provisions of section 53, a hearing of his claim before a jury and before any action of the court upon the report of the commissioners. The assessment at the next term, after final action, was altogether irregular, and created no debt. Had the matter been continued and the final action of the court postponed until after the question had been submitted to a jury, the court then had the power to say upon what conditions the road should be opened, or whether opened at all. In opening it they must see that these damages are in some way provided for, either that they be paid into the county treasury by the petitioners, or that the county itself assume them. But no such continuance was had, and the eighty-five dollars verdict is *coram non judice*.

It is also clear that the action of the Circuit Court was erroneous; but it is not so clear that the plaintiff is entitled to his writ of prohibition. If the court, whose action is complained of, acts within its jurisdiction, but simply commits an error, the writ will not lie. It is not to be confounded with a writ of error or of *certiorari*, and must not be permitted to take their place. Had, then, the Circuit Court jurisdiction over the County Court, by *mandamus*, in the matter of paying the damages assessed for the right of way upon a public road? If it had such jurisdiction, it does not matter, so far as this case is concerned, whether it has been lawfully or erroneously exercised. The County Court has the sole right of saying whether a road shall be opened, changed, or vacated, and the Circuit Court can not control its discretion in the matter. If a new road is to be opened, it has also the right of saying whether the damages, if any, shall be paid by the petitioners or by the county. If the court decides that the petitioners shall pay them, it ought not to order the road

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to be opened until the money is deposited. If it determine that the county shall pay them, the appropriation should be made before the road is opened. The county has clearly no right to open the road until one or the other is done. But, in either case, if the money is deposited by the petitioners, or if the court decides that the county shall pay the damages assessed, it becomes its clear ministerial duty to issue a warrant upon the treasury for the amount; and if the court refuses to issue such warrant, it should be compelled to do so by *mandamus*. It follows, then, that Circuit Courts have jurisdiction by *mandamus*, in the matter of payment of damages assessed to the person through whose land a road passes, and, in a proper case, may lawfully issue the writ. Such jurisdiction being conceded, it clearly follows that a writ of prohibition will not issue to prevent its erroneous exercise. Some other remedy must be resorted to.

The writ is dismissed. The other judges concur.

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SAUNDERS TOWNSEND, Defendant in Error, v. WM. A. HAWKINS,  
*et al.*, Plaintiffs in Error.

1. *Land, sale of—Part performance—Escrow—Delivery of deed.*—A. made a verbal contract with B. for the purchase of certain land. Part of the purchase money was paid at the time. The remainder was to be paid in two weeks, when a warrantee deed for the property was to be given. The deed in the meantime was deposited with a third party as an escrow. At the time named for completing the contract, A. refused to pay the remainder, and having purchased of C., who held adversely to B., went into possession under him. *Held*, that the facts showed no such part performance as to take the case out of the statute of frauds. Such a deposit of the deed could not be made to operate as a delivery. At law the statute would be a complete bar to an action to recover the money due, even if the contract were so performed as to make it a fraud to seek to evade it.

*Error to First District Court.*

*Miller, and Ewing & Smith, for plaintiffs in error.*

The statute of frauds is ample to defeat a recovery. (Gen. Stat. 1865, p. 438, § 5; 31 Mo. 54; 37 Mo. 388.)

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*W. Adams*, and *Draffin & Muir*, for defendant in error, cited *Ash, Adm'r, v. Holden*, 36 Mo. 166; *Abbott v. Allen*, 2 Johns. Ch., 519; *Smith v. Bailey*, 15 Mo. 389; *Farrar v. Patton*, 20 Mo. 84.

BLISS, Judge, delivered the opinion of the court.

The plaintiff presents his petition to the Saline Circuit Court, setting forth a verbal contract for the sale of certain lands to defendant, Hawkins, for the sum of \$1,600, the sum of \$100 being paid down and the balance to be paid in about two weeks, when a warrantee deed was to be delivered, the tender of the deed and refusal to pay, with other averments, and asking judgment for the \$1,500, and interest, and for the enforcement of the vendor's lien. It appears from the pleading and testimony that the plaintiff lived about twenty miles from the land; that when Hawkins paid him the \$100, it was arranged that the deed should be made and left at Arrow Rock for him with a son of plaintiff, who was to deliver it upon payment of the \$1,500; that it was so made and left, but that Hawkins called upon the son, told him that he had ascertained that his father had no title in the land, and refused to take the deed or pay the money. About this time—precisely when it does not appear—Hawkins being threatened by defendant Kean, the other claimant, with a lawsuit if he took possession under plaintiff, employed counsel to examine the title, who advised him that Kean had the better title, whereupon he took a contract of him and went into possession under it.

Hawkins and Kean, who is made a party on motion, answer separately, and, among other defenses, the former sets up the statute of frauds. The plaintiff seeks to avoid the force of this defense, by claiming that the contract has been executed in part; that Hawkins has paid a portion of the purchase money, has gone into possession of the property under the contract, and that the deed has been delivered to him by being placed in the hands of the mutual agent of the parties. The payment of the \$100 is admitted; the possession under the contract and the delivery of the deed are denied.



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The exceptions to the operation of the statute in a sale of lands are clearly and briefly stated by the original author of the treatise on Equity, edited by Fonblanque, B. 1, original page 181: "So if it (the contract) be carried into execution by one of the parties, as if by delivering possession, and such execution be accepted by the other, he that accepts it must perform his part; for where there is a performance the evidence of the bargain does not lie merely upon the words but upon the fact performed. And it is unconscionable that the party that has received the advantage should be admitted to say that such contract was never made." The books are full of cases illustrating these exceptions, and they are placed upon the ground that by enforcing the statute where one party has performed his part of the agreement, and that performance is accepted by the other, it would be a fraud not to compel him also to perform. (See Sugden on Vend., chap. 3, § 7, on bottom p. 139, &c., and cases cited in the Eng. & Am. Notes.)

But I have seen no case that will sustain the claim of the plaintiff. He is certainly not injured by his receipt of the \$100, and no act of the defendant has put him in a worse position than though the contract had not been made. Defendant, Hawkins, it is true, is in possession, but not under the plaintiff. The property was vacant, and it distinctly appears that he did not go into possession until after he had become dissatisfied with plaintiff's title, had renounced the contract, and made a new one with Kean. Had the plaintiff given him the possession the claim would have force; but as it is, it is taken under another, and is adverse to him. So with the execution and deposit of the deed. That showed a willingness to perform the contract on the part of the plaintiff, though he was not bound to do so, and if that performance had been accepted and taken advantage of by defendant the statute could not have shielded him. But the deposit of the deed as an escrow until he had performed the conditions stipulated was not a delivery, was not intended as a delivery, and can not be made to operate as one. (3 Washb. on Real Prop., side pp. 585-6; Shirley v. Ayres, 14 Ohio 308.)

As we view the contract it is unnecessary to decide whether this

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petition is an appeal to the law side of the court in the nature of an action to recover the money due upon the contract, or to the equity side for specific performance. If the former, the statute is a complete bar, even if the contract be so performed as to make it a fraud to seek to evade it; if the latter, equity in a proper case will enforce it. (Norton v. Preston, 15 Maine, 14; Griswold v. Messenger, 6 Pick. 517; Jackson v. Pierce, 2 Johns. 233; Barickman v. Kuykendall, 6 Blackf. 22.) The court seems to have treated it as an equitable petition, and to have passed upon the facts without the intervention of a jury. (Story, Eq. Juris., § 759, says that "The distinct ground upon which courts of equity interfere in cases of this sort, is, that otherwise one party would be able to practice a fraud upon the other." There is no fraud proved in this case; the plaintiff has suffered nothing in consequence of making the contract; there is no warrant for the interference of equity, and at law the contract, if not wholly void, can not be enforced against the will of either party.

Most of the record is occupied with another branch of the case. Kean, who claims to have owned the land, is made a party, and both he and the plaintiff make an exhibit of their titles. Our views of the operation of the statute of frauds renders it unnecessary to pass upon the question of title, and besides, that is an issue at law, and the parties in an action of ejectment have a right to a trial by jury.

The judgment of the District Court, the other judges concurring, is reversed.

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JACOB S. SCHELL *et al.*, Defendants in Error, *v.* CYRUS LELAND *et al.*, Plaintiffs in Error.

1. *Practice, civil — Orders of publication, facts authorizing — Statement of in petition or affidavit — Issue of in vacation, when allowable.* — Under the statute, relating to orders of publication (Wagn. Stat. 1008 § 13) when the facts authorizing publication were neither stated in plaintiffs' petition nor in an affidavit filed at the commencement of the suit, no order was allowable in vacation. Section 15 of the same chapter does not authorize an order of pub-

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lication in vacation at all, but intends that it shall be made by the Court at the regular return term. And an order of publication rendered, in vacation, on a sheriff's return that defendant was "not found," is a nullity.

2. *Practice, civil—Defective service, when waived and when not.*—An appearance and defense will be considered as a waiver of an imperfect return or defective service. But the appearance of a defendant for the especial purpose of moving the court to arrest a judgment constitutes no waiver of any valid objection which he has to defective process and service.
3. *Courts, inferior and local—Mechanics' liens—Situation of property, averment of petition as to.*—The Kansas City Court of Common Pleas was an inferior and local court. Under the act of March 2, 1859 (Sess. Acts 1858-9, p. 353, § 5), it had "concurrent jurisdiction with the Circuit Court to enforce mechanics' or other liens, in Kaw township. In a suit in that court on a mechanics' lien sought to be enforced against certain property in Kaw township: *Held*, that the petition not averring that the property was situated in that township was fatally defective. Where the judgments of local courts and courts of inferior jurisdiction are called in question, the record should show affirmatively all the facts necessary to give them jurisdiction, both of the subject-matter of the suit and of the parties to it.

#### *Error to First District Court.*

*Wm. E. Sheffield*, for plaintiffs in error.

The petition should allege that the property upon which the lien was sought to be enforced, was situated in Kaw township. The Kansas City Court of Common Pleas is a court of inferior and limited jurisdiction, and could take nothing by implication, and nothing will be presumed in favor of its jurisdiction. (*Bloom v. Burdick*, 1 Hill, 139; *Bridge et al. v. Bracken*, 3 Chand. 75; *Pelton v. The Town of Blooming Grove*, 3 Wis. 310; *Simmons v. De Barre*, 8 Abb. Pr. 269; 1 Johns. Cas. 2; *Walker v. Turner*, 9 Wheat. 549, *Curtis' ed.*, vol. 6, p. 178; *McCormick v. Sullivant*, 10 Wheat. 192; *Statey v. Bank of America*, 4 Dallas, 111; *Kemp's lessee v. Kennedy*, 5 Cranch, 185; *Schulenberg et al. v. Bascom et al.*, 38 Mo. 188; *McCune et al. v. Hull et al.*, 20 Mo. 596; *Patrick et al. v. Abeles*, 27 Mo. 184.)

*S. P. Twiss*, for defendants in error.

I. The order of publication was properly made by the clerk—it being his duty to issue such order at any time during vacation, upon the filing of the proper affidavit. (*Gen. Stat. 1865, ch. 167, §§ 13-15; Pomeroy et al. v. Butts et al.*, 31 Mo. 419.)

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II. Even if this were not true, the appearance of Leland in court, by attorney, cured and waived any defect or irregularity attending the order of notice or its publication. (*Buxton et al. v. Arnold et al.*, 9 How. 455; *Powers v. Browder's Adm'rs*, 13 Mo. 154; *Davis v. Wood*, 7 Mo. 162.)

III. The Kansas City Court of Common Pleas had jurisdiction over the subject-matter of the suit (Sess. Acts 1858-9, pp. 353-4, § 5, p. 355, § 15), and the court will take judicial knowledge of the fact that Kansas City is in Kaw township, Jackson county, State of Missouri. (*Price v. Page*, 24 Mo. 65; *State v. Warrell*, 25 Mo. 205, 212.)

WAGNER, Judge, delivered the opinion of the court.

This was a suit instituted in the Kansas City Court of Common Pleas to enforce a mechanic's lien. Several irregularities appear in the record, but, from the view we have taken of the case, they require no special comment. The petition was filed with the clerk of the Common Pleas Court on the 22d day of December, 1866, and on the 24th day of the same month a writ of summons was issued, directed to the marshal of said court, and made returnable on the fifth Monday in April next ensuing. The marshal did not hold the writ till the return day, but, on the 8th day of February intervening between the issuance of the writ and the day set for its return, he returned the same with the indorsement that the defendant Leland was not found in Kaw township, Jackson county.

After this return, and in the same month (February), the plaintiff filed his affidavit before the clerk, in vacation, stating that the defendant was a non-resident, and asking for an order of publication, which was made out and issued by the clerk, and published, and proof thereof made at the April term. At that term an attorney appeared and moved that Wilhite, who appears to have had some interest in the matter, be made a party defendant, which was sustained. No answer was filed, and judgment was rendered for plaintiffs. After the rendition of the judgment, the defendant Leland appeared, and stated that his appearance was special for the purpose of moving the court to arrest

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the judgment, on the ground that the defendant was never brought into court; that the order of publication was improperly entered by the clerk in vacation; and that the petition did not state facts sufficient to give the court jurisdiction of the subject-matter of the suit, because it failed to state that the premises in controversy were situated in Kaw township. This motion was overruled, and the case was then taken to the First District Court, where the judgment of the Common Pleas Court was affirmed.

The first question we will consider is the proceeding for obtaining an order of publication. The statute provides that in suits for partition, divorce, and attachment, and for the foreclosure of mortgages and deeds of trust, and for the enforcement of mechanics' liens, and all other liens against either real or personal property, and in all actions at law and in equity which have for their immediate object the enforcement or establishment of any lawful right, claim, or demand to or against any real or personal property within the jurisdiction of the court, if the plaintiff, or other person for him, shall allege in his petition, or file an affidavit, stating that part or all of the defendants are non-residents of the State, or have absconded or absented themselves from their usual place of abode in this State, or that they have concealed themselves, so that the ordinary process of law can not be served upon them, the court or clerk, in vacation, shall make an order directed to the non-residents or absentees, notifying them of the commencement of the suit, and stating briefly the object and general nature of the petition, and, in suits in partition, describing the property sought to be partitioned, and requiring such defendant or defendants to appear on a day to be therein named, and answer the petition, or that the petition will be taken as confessed; and where the court shall be required to make an order of publication, returnable to the next term thereof, there shall not be sufficient time to make publication of such term, the court shall make the order returnable to the first term thereafter that will allow sufficient time for its publication. (2 Wagn. Stat. 1008, § 13.)

The above section is the only one where provision is made for the court or clerk, in vacation, issuing an order of publication.

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The order can only be made by strictly complying with the statute ; for, in all cases where constructive notice is substituted for actual notice, strict compliance is required. The section contemplates and directs that the facts which authorize the publication shall be either stated in the petition, or an affidavit embodying them shall be filed at the commencement of the suit. This was not done in this case, and therefore no order was allowable in vacation under the foregoing section. The fifteenth section of the same act enacts that when, in any of the cases contained in the thirteenth section, summons shall be issued against any defendant, and the sheriff to whom it is directed shall make return that the defendant or defendants can not be found, the court, being first satisfied that process can not be served, shall make an order as required in the thirteenth section. But this section gives no countenance to the proceeding in the case at bar. It does not authorize an order of publication in vacation at all, but intends that it shall be made by the court at the regular return term. I conclude, therefore, that the publication was a nullity.

It is insisted, however, that there was an appearance by the defendants, and that if there was any error, it was waived. If this were so, it would undoubtedly cure the defect, for an appearance and defense will be considered as a waiver of an imperfect return or defective service. (*Bartlett v. McDaniel*, 3 Mo. 40 ; *Barnett v. Lynch*, *id.* 261 ; *Evans v. King*, 7 Mo. 411 ; *Griffin v. Samuel*, 6 Mo. 50 ; *Hembree v. Campbell*, 8 Mo. 572.) But the record does not sustain this assumption. The first movement upon the part of the defense states that the defendants appear and move that Wilhite be made a party. It is evident that this motion was not made on behalf of Leland, and that the appearance was not intended to be made for him. It seems to have been made by attorneys who represented Wilhite only, and Leland was not known on the record till he came in afterwards, and, by his own attorney, moved the court to arrest the judgment, for the reasons hereinbefore specified. His appearance for that special purpose constituted no waiver of any valid objection which he had to the defective process and service ; for a party who is in court for one purpose, is not necessarily in court for any other



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purpose. (Anderson v. Brown, 9 Mo. 638; Smith v. Rollins, 25 Mo. 408; Lincoln v. Hilbus, 36 Mo. 149.) I think that the objection raised was fatal, and that the motion should have been therefore sustained.

Another point has been urged in this court, and that is that the petition contained a fatal defect in not averring that the property on which the lien was sought to be enforced was situated in Kaw township. The Kansas City Court of Common Pleas is an inferior and local court, possessing only limited jurisdiction. The act amendatory to its establishment provides that it "shall have original concurrent jurisdiction with the Circuit Court to enforce mechanics' and other liens on real estate in Kaw township." (Acts 1858-9, p. 353, § 5.) In courts of general jurisdiction everything is presumed in their favor; not so with courts of limited and inferior jurisdiction. Local courts and courts of inferior jurisdiction must keep within the prescribed powers of their creation, and where their judgments are called in question, the record should show affirmatively all the facts necessary to give the court jurisdiction both of the subject-matter of the suit and the parties to it. The record in this case does not show that the court had any jurisdiction over the subject-matter.

Without pursuing the subject further, I am of the opinion that the judgment should be reversed. The other judges concur.

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STATE *ex rel.* JAMES CRAIG, Treasurer Kansas City Board of Education, Petitioner, *v.* CHARLES DOUGHERTY, Collector of Jackson County, Respondent.

1. *Practice, civil — Lis pendens — Plea in abatement — Board of education — Board de facto.*—Proof of the pendency of a former suit between the same parties, founded on the same cause of action is not a good ground for abatement unless the subsequent suit, on actual examination, proves to be vexatious and unnecessary. And where execution on a judgment in favor of the treasurer of a board of public schools, against a county treasurer was stayed by appeal to a District Court, proceedings in *mandamus* to enforce speedy payment of the amount sued for were not vexatious or unnecessary, so as to furnish good ground for a plea in abatement. In the latter proceedings,

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if persons constitute a board *de facto*, the legality of their election is not a subject of inquiry. Being a board *de facto*, the county treasurer may safely pay over money to them.

2. *Mandamus — Suit on bond — Board of education.*—The fact that the treasurer of a board of public schools has a remedy on the official bond of a county treasurer for non-payment of money, will not prevent his proceeding against him by *mandamus*.
3. *Board of education — County treasurer — Mandamus — Amount to be paid over not inquired into.*—In *mandamus* by the treasurer of a board of public schools against a county treasurer for non-payment of money owing to the board, this court will not investigate the question of the amount to be paid, or order the payment of a specific sum; but will require him to pay over the actual balance of collections in his hands, whatever it may be.

*Petition for mandamus.*

*H. B. Johnson, and A. Budd, for petitioner.*

I. Notwithstanding an action on the case may lie for neglect of duty, the respondent may be compelled by *mandamus* to exercise his functions, and perform his duties according to law. (McCullough v. The Mayor of Brooklyn, 23 Wend. 458; The People v. Mead, 24 N. Y. 120; *Ex parte* Lynch, 2 Hill, 47; Strong, petitioner, 20 Pick. 497; Osborn v. United States Bank, 9 Wheat. 844; Randall v. United States, 12 Pet. 615; Kendall v. Stokes, 3 How., U. S., 99; Philadelphia v. Johnson, 47 Penn. St. 382; Fremont v. Crippen, 10 Cal. 211; Hall v. Selectmen, &c., 39 N. H. 511; Case v. Wessler, 4 Ohio St. 561; Matter of the Trustees of Williamsburg, 1 Barb. 34; The County of Pike v. The State, 11 Ill. 202; Moses on Mandamus, 108-12; Hall v. County Court of Audrain County, 27 Mo. 329; Cass Township v. Dillon, 16 Ohio St. 38; Carpenter v. Co. Com. of Bristol, 21 Pick. 259; Com. v. Rosseter, 2 Binn. 360; School District No. 1 v. District No. 2, 3 Wis. 333; People v. Supervisors of Macomb, 3 Mich. 475; Marathon v. Oregon, 8 Mich. 372; Hamilton v. The State, 3 Ind. 527; People v. State, 2 Barb. 397-418.)

II. An action on the bond of the collector would not be a complete, adequate and specific remedy.

III. The withholding this money is a continuing injury for which separate actions from time to time would lie.

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IV. The more recent and reasonable practice is, to inquire and determine as a matter of fact whether the second suit is unnecessary, oppressive or vexatious, and if not to allow it to stand. (Downer v. Garland, 21 Verm. 362.)

V. The title to office of an officer *de facto* can not be inquired into collaterally. (Hall v. Luther, 13 Wend. 491; People v. Hopson, 1 Den. 574; Ring v. Grout, 7 Wend. 341; McCoy v. Curtice, 9 Wend. 17; Stevens v. Newcomb, 4 Den. 437; Facey v. Fuller, 13 Mich. 527; Satterlee v. San Francisco, 23 Cal. 314; Hooper v. Goodwin, 48 Maine, 79; Colton v. Beardsley, 38 Barb. 29.)

VI. But in collecting the tax levied by said board, and paying a portion thereof over, the respondent has admitted that they are a legal board, and he is now estopped from denying it. This amounts to an estoppel *in pais*. (6 Bac. Abr. 447.)

VII. The statement in the return, that the respondent does not know the amount of money in his hands to which said board is entitled, is evasive and frivolous. He is bound to know the amount and hold himself in readiness to pay the same over upon demand. (Sess. Acts 1867, p. 182, § 9.)

*J. R. Sheley*, for respondent

The pendency of the other *mandamus* (now pending in the District Court) is a complete bar to this proceeding; otherwise it amounts to a review of the action of the inferior court before which the case was tried, and which can not be done. (Little v. Morris, 10 Tex. 263; Tapping on Mandamus, 343; People, etc., v. Warfield, 20 Ill. 164; State v. Jones, 10 Iowa, 65; 1 Moses on Mandamus, 213.)

CURRIER, Judge, delivered the opinion of the court.

This is a petition for a writ of *mandamus*, requiring the respondent to pay over the school moneys in his hands, as collector of Jackson county, to the treasurer of the board of education of Kansas City. Among other things, the petition shows that the board of education duly assessed school taxes for the support of the public schools of Kansas City for the year 1869; that these

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taxes were duly extended and placed in the respondent's hands for collection; that he has made collections to the amount of some \$25,000, which he neglects and refuses to account for and pay over, as required by law; that no payments have been made since June last, although prior to that time payments were made and the authority of the board recognized; that the schools can not be kept up and continued without the funds in the hands of the respondent, which he wrongfully withholds from the use of the board.

The respondent, by his return, admits that the parties named in the petition as constituting said board of education, are and have been acting in that capacity; that he has paid over school moneys to their treasurer, as alleged in the petition; but denies that said parties were legally elected, and denies that they constitute the legal board of education; and avers that certain other named parties are claiming to constitute said board, and require the school moneys to be paid to them; and further, that he is not able to state the exact amount of school moneys in his custody; and insists that this court can not go into that inquiry and determine the amount.

As ground of abatement, it is alleged that a prior suit, similar to this, between the same parties and for the same cause of action, is now pending in the First District Court, having been taken there by the respondent, on appeal from the judgment of the Court of Common Pleas of Kansas City. It is also alleged that the relator has an ample remedy for the grievance complained of, by suit on the respondent's official bond, and it is therefore insisted that *mandamus* will not lie.

The questions for consideration and decision, in this case, arise upon demurrer to the respondent's return to the alternative writ:

1. Waiving the question whether it is allowable to plead in abatement and to the merits, in the same pleading, I will proceed to consider the question whether these proceedings are abatable because of the matters alleged in the return. The ground on which courts proceed in the abatement of subsequent suits is that they are unnecessary, and are therefore deemed vexatious and oppressive. But the modern practice is not to infer, as matter

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of law, that the subsequent suit is vexatious and unnecessary, from the mere fact of the pendency of a prior suit between the same parties, founded on the same cause of action, but to proceed, upon inquiry, into the actual circumstances of the two cases, and then determine, as a matter of fact, whether the subsequent suit is unnecessary and vexatious. (*Downer v. Garland*, 21 Verm. 362.) The inquiry, then, is, whether this proceeding is in fact vexatious and unnecessary. Is the relator's remedy full and effectual by the first process? Or is that process inadequate and insufficient for the protection of the public interests involved? The case shows that the public schools of Kansas City are exposed to disastrous consequences unless the moneys locked up in the respondent's hands can be made available at once, or at an early day. The remedy, in order to meet the exigency of the schools, must be rapid in its progress. Time is an essential element to be considered in judging of its adequacy. But no final disposition of the prior suit can be had in the court of last resort without a further delay of six or twelve months. In the meanwhile what will become of the public schools? They must be disbanded, unless the public money provided for their use can, by some process, be made available. The respondent, as the case shows, has paid over none of these moneys for the last seven months. He admits that he has made collections, and that school moneys of an indefinite amount remain in his custody, which he refuses to pay over and account for. Plainly, this condition of things should be broken up without unnecessary delay. The public interests involved are too urgent and important to warrant a further delay of the remedy for another seven months. The remedy by the first suit, therefore, is clearly inadequate to meet the necessities of the schools, and this proceeding is resorted to for that reason. It was not vexatiously intended, and we do not hold it to be so in fact. It was not resorted to till the respondent had, by his appeal, arrested the execution of the judgment of the Common Pleas Court. It is to be observed, moreover, that the misconduct charged upon the respondent is continuous, exposing him to successive suits. This suit embraces more than the first. The petition counts on a breach of duty

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alleged to have occurred on the twenty-third day of December, 1869—a considerable length of time after the first suit was instituted, and which the first suit could not have included. The causes of action, therefore, are not strictly identical.

2. But the respondent further insists that these proceedings ought not to be upheld, because he says that the persons constituting the *de facto* board of education, were not legally elected, and do not, therefore, constitute the legal board. Whether or not they were legally elected and are legally in office, depends upon the facts and circumstances of the election; and the facts are not set out so that it can be seen whether or not the board is a legal one. The respondent, in this respect, alleges a mere conclusion of law. But, whether legally elected or not, the parties in question are admitted, by the pleadings, to be in office, and in the discharge of the functions thereof; and that is sufficient for the purposes of the case, and sufficient to warrant the respondent in dealing with them as constituting a board legally competent to discharge the duties thereto appertaining. They constitute the *de facto* board of education of Kansas City, and the legality of their election is not a subject of inquiry here. (Facey v. Fuller, 13 Mich. 527; Hooper v. Goodwin, 48 Me. 79. People v. Hopson, 1 Denio, 574.) Moreover, the respondent, by his repeated acts, has recognized the legal existence of the board as at present constituted. He collected the taxes assessed by them, and paid over the proceeds of his collections, down to June, 1869. (See 6 Bac. Abr. 447.) The pleadings show this, and they fail to show that any legal proceedings have been instituted to test the rights of the parties to the office they actually hold and enjoy, and the duties of which they have discharged for a considerable length of time. Being the *de facto* board of education, the respondent may safely pay over to them the money in his hands, as he ought to have done long ago.

3. It is further urged that a peremptory writ ought not to issue herein, for the reason that the relator has a remedy on the respondent's official bond. That circumstance does not bar this suit. (Cass Township v. Dillon, 16 Ohio St. 38; School District No. 2 v. District No. 1, 3 Wis. 333; Kendall v. United States, 12 Pet. 615.)



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4. But the respondent avers that he does not know and is unable to state exactly how much of the public funds remain in his hands. It is his business to be conversant with these facts, and he must, at his peril, inform himself in regard to them. It is true that this court will not go into any investigation of that matter. Nor will it, under the case made, direct him to pay over any specific sum of money. It will, however, require him to pay over the actual balance of collections in his hands, whatever it may be. He must ascertain the amount for himself and see to it that he renders an accurate return.

The peremptory *mandamus* will be ordered; the other judges concurring therein.

DAVID S. WOODWARD, Plaintiff in Error, v. CLAYTON VAN HOY,  
Defendant in Error.

1. *Conveyances — Title bond — Purchase — Possession taken after — Refusal of deed — Suit for recovery of purchase money.* — When one pays the money and takes possession under a title bond for the conveyance of land, and the vendor after neglecting, for three years, to execute the deed, makes tender thereof, the vendee can not reject the deed, and sue for the recovery of the purchase money. Time not being of the essence of the contract, and the vendee being in possession, the delay was not such as to furnish ground for rescission of the contract.

*Error to First District Court.*

*Harden*, and *Lay & Belch*, for plaintiff in error.

*Johnson & Budd*, for defendant in error

I. When the purchase money has been paid and the vendee is in possession he can not rescind and recover back the purchase money, even though the vendor make default to convey. His only remedy in such cases is by petition for specific performance. (1 Hilliard on Vendors, 299, § 18; Barickman v. Kuykendall, 6 Blackf. 21; Secrest v Jones, 21 Texas, 121.)

II. Nor can the contract be rescinded by the vendee without restoring possession to the vendor. (Tompkins v. Hyatt, 28

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N. Y., 1 Tiffany, 347; McDonald v. Vaughn, 14 La. An. 716; Bellows v. Clark, 20 Ark. 421; Moore v. Smedburg, 8 Paige Ch. 600.)

III. Time was no longer the essence of the contract, having been waived by vendee taking and continuing in possession, and could not again be reasserted. (1 Hilliard on Vendors, 300, § 19.)

WAGNER, Judge, delivered the opinion of the court.

The defendant executed to one Eliza Crowell a title bond, whereby he bound himself to convey to said Eliza a certain lot therein described, upon payment of the purchase money. This bond was subsequently assigned and transferred to the plaintiff in this case, who paid the purchase money, and took possession of and occupied the premises.

At the time of the original purchase, when the title bond was made, the defendant was not in a condition to execute a deed, as he had purchased at sheriff's sale, and the sheriff had not conveyed the same to him. He afterwards obtained a deed, and the plaintiff demanded a conveyance, but the defendant neglected to make out and execute one for about three years. Plaintiff then brought suit to recover the purchase money, whereupon defendant came into court and tendered a deed. This the plaintiff refused to accept, and upon a hearing of the cause the court rendered judgment in his favor, which the District Court reversed.

The action was not brought for a rescission or disaffirmance of the contract, and the record fails to disclose that any objection was made to the deed, on the ground that it did not convey a good title, or otherwise.

The only point is: did the delay in making the deed authorize the plaintiff to maintain his action, or pursue this remedy? Where time is not of the essence of the contract, a neglect or delay to execute and deliver a conveyance is not generally an impairment of the rights of the parties. And where time is not material, it is sufficient if the vendor can make a good title before judgment or decree is rendered. (1 Sudg. on Vend., 294;

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Lockett v. Williamson, 31 Mo. 54; 7 Mo. 388, and cases referred to.) If any injury has resulted on account of the delay, courts usually furnish compensation in damages.

But in the case at bar it is evident the plaintiff was in no situation to maintain his action. It clearly appears that he went into possession under the contract and retained the possession; and where a purchaser takes possession of premises under an agreement to purchase, he can not proceed against his vendor for the purchase money or for rescission without surrendering the possession. He will not be allowed to retain the property and have the money besides.

Less diligence is required of the owner in perfecting the title when the purchaser is in possession than when he is not—hence, in a well considered case it was held that a delay on the part of the vendor, or his heirs, to deliver the deed for a period of ten years after the time fixed by contract, furnished no ground for the rescission of a contract by a vendee, so long as he continued in undisturbed possession of the premises under the contract. (Tompkins v. Hyatt, 28 N. Y. 347.) I am for affirming the judgment.

Judgment affirmed. The other judges concur.

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STATE OF MISSOURI, Defendant in Error, v. SAMUEL W. SCOTT,  
Plaintiff in Error.

1. *Crimes and punishments — Passing forged checks — Evidence — Handwriting — Comparison.*—In an action for passing a counterfeit or forged bank check, where the signature and indorsement were positively proved and no other papers were introduced in evidence for the purpose of admitting testimony by comparison, it was competent to submit the whole paper to the jury, with or without the aid of experts, for them to form their own conclusion as to whether the whole instrument thereon was produced by one and the same hand.
2. *Practice, criminal — Trial — Re-trial at same term where no verdict.*—A prisoner may be again put on trial at the same term where the first trial has not resulted in a verdict.

*Error to First District Court.*

*Budd*, for plaintiff in error.

A witness can not testify to the handwriting of a party from mere comparison with other writing proved to be genuine. (2 Phillips on Ev. 609-615, and notes; 4 Blackst. 358; The People v. Spooner, 1 Denio, 343; Jackson v. Phillips, 9 Cow. 112; Wilson v. Kirkland, 5 Hill, 182; Clark v. Wyatt, 15 Ind. 271; Jumpertz v. People, 21 Ill. 375; Bishop v. State, 30 Ala. 34; McNair v. Commonwealth, 26 Penn. St. 388; Outlaw v. Hurdle, 1 Jones, Laws N. C., 150; Hawkins v. Grimes, 13 B. Monr. 258, 267; Kinney v. Flynn, 2 R. I. 319; Smith v. Walton, 8 Gill, 77; McAllister v. McAllister, 7 B. Monr. 269; Pope v. Askew, 1 Ired. 16; Page v. Homans, 2 Shep. 478; Bank of Pennsylvania v. Holdeman, 1 Penn. 161; Hawkins v. Stuyvesant, Anthon, 97; State v. Givens, 5 Ala. 747; Bell v. Harper, Holt, 421.)

*H. B. Johnson*, attorney-general, for defendant in error.

The handwriting of two documents, or different portions of the same document, when they are already in evidence for other purposes, may be compared by the jury, with the aid of experts, for the purpose of showing that they were both written by the same person. (Doe v. Suckermore, 4 A. & E. 703; Hammond's case, 2 Greene, 33; Smith v. Sainsbury, 5 C. & P. 195; Cater's case, 4 Esp. 177; Griffiths v. Williams, 1 C. & J. 47; Solita v. Yarrow, 1 Mood. & R. 133; Doe v. Newton, 5 Ad. & El. 514; Bromage v. Rice, 7 C. & P. 548; Commonwealth v. Carey, 2 Pick. 47; Moodey v. Rowell, 17 Pick. 490; Hicks v. Person, 19 Ohio, 426; Richardson v. Newcomb, 21 Pick. 315; Lyon v. Lyman, 9 Conn. 55; Goodtitle v. Braham, 4 Tenn. 497; Waddington v. Cousins, 7 C. & P. 595; Van Wick v. McIntosh, 14 N. Y. 439; 1 Greenl. Ev., 12th ed., §§ 578-581; Depue v. Place, 7 Barr. 428; Rogers v. Shaler, Anthon, 109; Brooks v. Tichborne, 2 Eng. L. & Eq. 374.)

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted and convicted in the Jackson County Circuit Court for passing a counterfeit and forged bank check. The main question here is the action of the court in admitting testimony on the part of the State. The check purported to be drawn on the Lexington (Ky.) National Bank, and was signed with the name of Geo. B. Lucas, as maker, and the name of the defendant was inserted in the body as payee. The defendant indorsed and delivered the check to one Sheridan, who saw him write the indorsement, and he afterward acknowledged that he wrote the check himself, and that Lucas was a myth, there being no such person in existence. On the trial, the State introduced two witnesses, who were bankers and who were permitted to state that in their opinion the indorsement and the check were in the same handwriting. This was objected to by defendant, and the objection overruled. The paper was then submitted to the jury for their examination. All evidence of handwriting, except where the witness saw the document written, is in its nature comparison, and founded upon opinion. It is the belief which the witness entertains, upon comparing the writing in question with its exemplar in his mind, derived from some previous knowledge. It is agreed that if the witness has the proper knowledge of the party's handwriting, he may declare his belief in regard to the genuineness of the writing in question. The point upon which courts have differed in opinion is upon the source from which this knowledge is derived, rather than as to the degree or extent of it. (1 Greenl. Ev. § 576.)

The modes of acquiring this knowledge, so as to permit the witness to testify as to the genuineness of the handwriting, are: first, by having seen the person write; and it is held sufficient for this purpose that the witness has seen him write but once, and then only his name. The proof in such case would be very light, but it would be proper for the jury to weigh it. The other mode is, from having seen letters, bills, or other documents, purporting to be the handwriting of the party, and having afterward personally communicated with him respecting them.

In *Reyburn v. Bellotti*, 10 Mo. 597, it was held that a witness may acquire such knowledge of a person's handwriting as to authorize him to testify to his signature by having seen his letters on business with a firm of which witness was clerk, and finding that he acted upon and recognized the letters.

But Greenleaf says the rule as above stated has been relaxed in two cases: first, where writings are of such antiquity that living witnesses can not be had, and yet are not so old as to prove themselves. Here the course is to produce other documents, either admitted to be genuine or proved to have been respected and treated and acted upon as such by all parties; and to call experts to compare them, and to testify their opinion concerning the genuineness of the instrument in question. Second, where other writings, admitted to be genuine, are already in the case. Here the comparison may be made by the jury, with or without the aid of experts. The reason assigned for this is, that as the jury are entitled to look at such writings for one purpose, it is better to permit them, under the advice and direction of the the court, to examine them for all purposes, than to embarrass them with impracticable distinctions to the peril of the cause. (1 Greenl. Ev. § 578.)

So Phillips, in commenting on the question, says: "Within a recent period a rule has been established which amounts to a considerable relaxation of the strictness of the law in regard to the the direct comparison of handwriting. Upon a question respecting the identity of handwriting, the jury may be allowed to take other papers which have been proved to be in the writing of the party whose handwriting is disputed (provided they are part of the proofs in the cause), and may compare them with the disputed writing, for the purpose of forming their opinion whether the disputed writing is genuine." (2 Phil. Ev., ed. 1859, p. 615.) This is now the recognized principle in England, and has been followed in many of the American cases. (*Hicks v. Parson*, 19 Ohio, 426; *Bowman v. Sanborn*, 5 Fost. 87; *Henderson v. Hackney*, 16 Ga. 521.)

In Vermont, genuine signatures are allowed to go to the jury for comparison. (*Adams v. Field*, 21 Verm. 256.) The strongest



and best reason in support of the rule for rejecting evidence founded on comparison of handwritings in ordinary cases, is that the writings, intended as specimens to be compared with the disputed paper, would be brought together by a party to the suit, who is interested to select such writings only as may best subserve his purpose, and that they are not likely, therefore, to exhibit a fair specimen of the general character of handwriting. And it may be further said that this species of evidence might cause inconvenience by raising numerous collateral issues, and often come by surprise against the party to be affected by it.

But the case we are now considering seems to come within the exception or relaxation of the rule as stated by Greenleaf and Phillips. There was no collateral issue raised, nor any irrelevant or outside paper or writing introduced for the purpose of admitting testimony by comparison. The forged check was the exact paper in evidence, and, independently of the acknowledgment of the prisoner, the indorsement and signature were positively proved, and it was competent to submit the whole paper to the jury, with or without the aid of experts, for them to form their own conclusion as to whether the whole instrument, with the indorsement thereon, was produced by one and the same hand.

The defendant was tried twice at the same term. On the first trial the jury disagreed and were discharged. Another jury was empaneled, without objection; he pleaded not guilty; was regularly tried and convicted. I am not aware that any error was committed in this. I know of no law which prohibits the court from again putting the prisoner on trial at the same term, when the first trial has not resulted in a verdict. The record does not show that he suffered any injustice by the proceeding. He acquiesced in it at the time, and we see no reason to interfere on that account.

Judgment affirmed. The other judges concur.

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Gillett v. Mathews.

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V. C. GILLETT, Defendant in Error, v. BENJAMIN MATHEWS,  
Plaintiff in Error.

1. *Practice, civil — Testimony — General exceptions to, not sufficient.*— General exceptions to all testimony will not be re-examined in the Supreme Court.
2. *Forcible entry and detainer — Action by purchaser against lessee in possession, what question submitted to the jury — Construction of statute.*— In an action of forcible entry and detainer by the purchaser of certain property against a lessee in possession, it is proper to submit to the jury by an instruction, the question whether plaintiff, by proper conveyances, had succeeded to the right and remedies of the lessor. (Gen. Stat. 1865, p. 733, §§ 36, 40; Wagn. Stat. p. 648, §§ 36, 40.)
3. *Forcible entry and detainer — Peaceable possession — Limitation of three years — Does not apply when.*— The three-years limitation to proceedings for forcible entry and detainer (Gen. Stat. 1865, ch. 187, § 27; Wagn. Stat. 646, § 27) does not apply to cases where defendant was lessee, and held his possession under plaintiff, as lessor, or under the plaintiff's grantor, or under the prior owner.

*Error to Third District Court.*

J. F. Hardin, for plaintiff in error.

Sherwood & Buller, and J. & U. Bruneback, for defendant in error.

The grantees and purchasers from the lessor have now in this State the same remedy for possession by unlawful detainer that the lessor might have had. (Wagn. Stat. 648, §§ 36, 37, 40; Gen. Stat. 1865, p. 733, §§ 36-7; Ferguson v. Brook, 27 Mo. 249; Young v. Smith, 28 Mo. 65; Pentz v. Kuester, 41 Mo. 447; Fanning v. Voelker, 40 Mo. 129; Wood v. Dalton, 26 Mo. 581.)

CURRIER, Judge, delivered the opinion of the court.

This is an unlawful detainer suit. On appeal from the judgment of the justice to the Circuit Court, the plaintiff obtained judgment for possession, which was affirmed in the District Court, and the defendant brings the cause here by writ of error. It is objected that improper evidence was admitted in behalf of the plaintiff, and that the court misdirected the jury.

1. The record contains a minute at the foot of the testimony, showing that the defendant objected to all of the plaintiff's evidence, but for what reason, or upon what grounds, does not appear. The objections are therefore not open for re-examination here. (*Knipper v. Bechtner*, 32 Mo. 255.)

2. The plaintiff gave evidence tending to show that one Thatcher was in possession of the disputed premises in the summer of 1862; that he put the defendant in charge of the property, with liberty to occupy it for his own use, without accountability for rent, until Thatcher should call for it, the duration of the tenancy being left open and indefinite. On the 23d of December, 1865, Thatcher sold and conveyed the premises to one Wells, informing him of the defendant's relation to the property, and Wells subsequently sold and conveyed to the plaintiff, who instituted these proceedings after demand and notice, to-wit: on the 2d day of March, 1868. The defendant's possession was continuous from the summer of 1862, but he paid no rent, and there was evidence tending to show that he recognized Wells as the owner of the property after the latter's purchase from Thatcher.

On this general basis of fact and evidence, the court gave one instruction for the plaintiff and none for the defendant. The instruction given for the plaintiff is complained of as erroneous because it is supposed to submit to the jury the question of title to the premises, and the title, it is insisted, can not be inquired into in this form of action. The instruction does not submit the question of title as between the lessor and lessee, but simply the question whether the plaintiff by proper conveyances had succeeded to the rights and remedies of the lessor—and this was proper. (*Gen. Stat.* 1865, p. 733, §§ 36, 40; *Young v. Smith*, 28 Mo. 65; *Pentz v. Kuester*, 41 Mo. 447.) That the deeds read in evidence conveyed to the plaintiff all of Thatcher's right does not appear to have been a disputed proposition. The instruction is further objected to because it is supposed to base the plaintiff's right of recovery on the admission by the defendant of title in the plaintiff and those standing back of him in the chain of title, within the three years next preceding the institution of the suit.

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Gillett v. Mathews.

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The instruction is unhappily drawn in this respect, and incorporates superfluous matter, but the superfluous matter thus incorporated would seem to be more prejudicial in its tendency to the plaintiff than the defendant; for it appears to make it conditional to the right of recovery that the jury should be satisfied not only that the plaintiff had succeeded to the rights and remedies of the defendant's lessor, but also that the defendant had admitted the facts to be so. The deeds read in evidence established the plaintiff's rights in this regard, without reference to the defendant's admissions.

The defendant asked the court to instruct the jury that if they believed from the evidence that the defendant has been in possession of the premises in controversy more than three whole years next before the 2d day of March, 1868, they should find for him. This instruction is founded upon a misconstruction of section 27, chapter 187, of the General Statutes, and was properly refused. It has been held that this provision of the statute did not apply to cases where the defendant was lessee and held his possession under the plaintiff as lessor. (*Grant v. White*, 42 Mo. 285.) Nor does it apply, and for the same reason, when the defendant was the lessee and held his possession under the plaintiff's grantor or the prior owner, as in this case. The relation of lessor and lessee subsisted between defendant and Thatcher down to the time of Thatcher's conveyance to Wells, December 23, 1865, and that conveyance terminated the defendant's relation to the premises as lessee, and made his possession thenceforward adverse; still, the suit was brought within the prescribed three years. But there was evidence tending to show that the tenancy continued under Wells, and that Wells was recognized as the owner of the premises and as the defendant's landlord. The defendant's instruction was too broad and sweeping, and failed to embrace the controlling elements of the case.

The other judges concurring, the judgment will be affirmed.

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Merchants' Bank v. Ward's Adm'r.

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MERCHANTS' BANK, Respondent, v. GEO. E. WARD'S ADM'R,  
Appellant.

1. *Practice, civil—Bill of exceptions, must show that all the evidence is included.*—A bill of exceptions need not, in words, state that it contains all the evidence if, from the whole record, such is plainly the fact.
2. *Administration note—Affidavit, what sufficient.*—An affidavit attached to a note filed against an estate in a Probate Court, concluding thus: "The estate has been given credit for all the judgments and offsets to which it is entitled on the demand above described, and the balance there claimed is justly due," shows a substantial compliance with the requisitions of the statute. (Wagn. Stat. p. 103, § 13.)

*Appeal from Third District Court.*

*McAfee & Phelps*, for appellant.

• *Hardin & Sherwood*, for respondent.

CURRIER, Judge, delivered the opinion of the court.

1. It is objected that the bill of exceptions does not purport to contain all the evidence given on the trial in the court below. It does not so declare in formal words, but it is nevertheless sufficiently apparent, from the whole record, that such is the fact. It shows what evidence was offered by the plaintiffs, and that the whole of it was ruled out, whereby the plaintiffs were driven to a non-suit.

2. It is objected that evidence was improperly excluded. The claim is founded on decedent's promissory note, the execution of which was admitted. It was duly allowed and classed in the Probate Court, whence an appeal was taken to the Circuit Court. On the trial there, the note was objected to and excluded on the ground that the affidavits thereto attached did not show a compliance with the provisions of the statute. (Gen. Stat. 1865, p. 502, §§ 12-14.) It concludes thus: "The estate of George E. Ward has been given credit for all judgments and offsets to which it is entitled on the demand above described, and the balance there claimed is justly due." The objection is that, for aught that the affidavit asserts, the bank may be indebted to the estate on other accounts. The affidavit, according to its literal reading,

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State of Missouri, at the relation and to the use of Crow et al. v. Cox.

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shows that there were no "other accounts" applicable in payment of the note, or constituting an offset thereto, and that the balance claimed thereon was justly due. No objection appears to have been taken to the affidavit in the Probate Court, and I am of the opinion that it shows a substantial compliance with the requisitions of the statute, and that it meets the substantial purposes of the law in that behalf. The affidavit is a matter of mere preliminary proof, and its phraseology should have a fair and liberal construction. The construction contended for by the defendants is narrow, technical, and inadmissible. *Peter v. King*, 13 Mo. 143, is a wholly different case from this.

The District Court reversed the judgment of the Circuit Court, and its judgment is affirmed. The other judges concur.

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THE STATE OF MISSOURI, AT THE RELATION AND TO THE USE OF  
WAYMAN CROW *et al.*, Appellants, *v.* PLEASANT M. COX,  
Respondent.

1. State *ex rel.* Collins *et al.* v. Dulle *et al.*, *ante*, p. 269, affirmed.

*Lindenbower & Sherwood*, for appellants.

*F. P. Wright*, and *R. F. Buller*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

It appears from the record that Cox, the respondent, was administrator of the estate of one Nash, deceased; that his letters of administration were revoked, and an administrator *de bonis non* appointed. The appellants had a demand against the estate, and they brought suit against him in the St. Clair Circuit Court, upon his official bond subsequent to the revocation of his letters, and obtained judgment. This judgment was reversed in the District Court.

The same point arises here that was decided by this court at the present term, in the case of Collins *et al.* v. Dulle *et al.*—



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namely: that the action was not maintainable at the instance of the creditor, but must be prosecuted by the succeeding administrator.

Though this was not the reason given by the District Court for the reversal, still its judgment was right and must be affirmed.

Affirmed. The other judges concur.

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JAMES AND WILLIAM PATRICK, Plaintiffs in Error, v. M. D. FAULKE *et al.*, Defendants in Error.

1. *Mechanics' liens — Four months expiring Sunday, lien must be filed Saturday.*— Under the mechanics' lien law (Wagn. Stat. 909, § 5), when the four months after the indebtedness accrued expired on Sunday, the lien is insufficient unless filed on the Saturday preceding. The act touching construction of statutes (Wagn. Stat. 888, § 6) must be construed in its restrictive sense, and in the case supposed both the first and last day must be excluded.

*Error to First District Court.*

*Lay & Belch*, for plaintiffs in error.

I. The exclusion of the first and the last days clearly means that the party shall have four months within which to file his lien, besides these days, and without counting either one of them. (*Carothers v. Wheeler*, 1 Oregon, 194.)

*King Brothers*, and *Ewing & Smith*, for defendants in error.

To have been in time, the lien should have been filed on the 7th of March. (Sedgw. Stat. & Const. Law, 420; *Broome v. Wellington*, 1 Sandf. 664; *ex parte Dodge*, 7 Cow. 147; 2 Hill, 376.)

WAGNER, Judge, delivered the opinion of the court.

This case is brought up on error from the First District Court, where judgment was rendered for the defendants. The action was to enforce a lien for materials furnished and supplied in the

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erection of a building, and the only question presented by the record is whether the same was filed within the statutory time.

The law applicable to this case declares that the account, etc., shall be filed with the clerk "within four months after the indebtedness shall have accrued." The materials were furnished on the 8th day of November, 1867, and the lien was filed on the 9th day of March, 1868. The 8th day of March was Sunday. The four months expired on the 8th, and, as that day was Sunday, the whole contention springs out of the question whether a filing on Monday was sufficient, or whether it should have been on the preceding Saturday.

The statutory provision in regard to the computation of time declares that the "time within which an act is to be done, shall be computed by excluding the first day and including the last; if the last day be Sunday, it shall be excluded." (2 Wagn. Stat. 888, § 6.) It must be conceded that the question is not entirely clear, or free from difficulty. Courts have frequently been embarrassed in computing the time within which an act must be done; and the decisions are inharmonious. In Oregon, on a statute using the precise phraseology of ours, the court holds that where the last day falls on Sunday, the act may be done on the succeeding Monday. (*Carothers v. Wheeler*, 1 Oregon, 194.)

But the weight of authority in respect to the construction of statutory acts is decidedly the other way—holding that when the last day for the performance of a given act falls on a Sunday, the act must be done on the preceding day. (*Sedgw. Stat. & Const. Law*, 420.) In the construction of rules of court in respect to time for pleading and other matters of practice, it is well settled that if the last day fall on Sunday, the party has the whole of the next day in which to perform the act required. (*Cock v. Bunn*, 6 Johns. 326; *Borst v. Griffin*, 5 Wend. 84; *Lee v. Carlton*, 3 T. R. 642; *Solomons v. Freeman*, 4 T. R. 557; *Harbord v. Perigal*, 5 T. R. 210; *Shadwell v. Angell*, 1 Burr. 56; 1 Sellon's Pr. 95; 1 Tidd's Pr. 433; *Grah. Pr.* 220–230, 713; 2d ed.)

So, on contracts in regard to which no days of grace are allowed. There, if the specified time for payment or performance fall on

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Sunday, the debtor has the following Monday on which to discharge his obligation. (Salter v. Bush, 20 Wend. 205; Avery v. Stewart, 2 Conn. 69; though ruled differently in Maryland: Kilgour v. Miles, 6 Gill. & Johns. 268.) But in commercial law, where days of grace are allowed, the rule has always been different; and where a bill or note falls due on Sunday, it is payable on the previous Saturday. (Chit. on Bills, 410, note.) And in the construction of the statutes the principle has generally been held the same. Thus, in *Ex parte Dodge*, 7 Cow. 147, the question was whether an appeal from a justice's judgment was regular if brought on Monday, where the time limited by the statute (10 days) expired on the day before. The court held that it was not. The same doctrine was explicitly enforced in *Broome v. Wellington*, 1 Sandf. 664, and it was said where the period fixed by a statute, for doing any act, expires on Sunday, the act must be done on the preceding day; and intermediate Sundays are included in the computation. (See also *Anon.*, 2 Hill, 376.) The word "excluded," as used in the statute, is somewhat ambiguous when practically applied; but, as the general rule is, when construing statutes, to give it a restrictive operation, and, as such is the recognized principle in commercial law, I am of the opinion that the Legislature used it in this sense. The language of the statute would seem to import and imply this construction. In the computation, the first day is to be excluded and the last day included; but, if the last day fall on Sunday, it, too, shall be excluded, showing that the act, then, must be performed on the previous Saturday.

Whilst the lien law is beneficial and just, and highly favored, yet it gives an extraordinary right to the party seeking to avail himself of its advantages; and he must, therefore, bring himself strictly within the conditions of the statute. I think that the lien should have been filed on Saturday, and that Monday was too late. It follows that the judgment of the District Court was right and should be affirmed.

Judgment affirmed. The other judges concur.

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Freeman et al. v. Rollins.

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FENWICK FREEMAN *et al.*, Appellants, *v.* WILLIAM ROLLINS,  
Respondent.

1. *Attachment—Order of publication, may be issued on affidavit at time of issuing writ.*—In attachment suits courts have power to award orders of publication, on affidavit at the same term during which the suit was commenced. (R. C. 1855, ch. 128, § 13; Wagn. Stat. 1008, § 13.)

*Appeal from Third District Court.*

*Ewing & Smith*, and *Baker & Ellis*, for appellants.

*J. F. Hardin*, for respondent.

CURRIER, Judge, delivered the opinion of the court.

This is a suit in ejectment, and involves the validity of an order for publication of notice in a cause wherein the disputed premises were attached on *mesne* process, and subsequently sold under the execution issued upon the judgment therein rendered. The plaintiffs contest the title acquired under the sale on the ground that the judgment was rendered in pursuance of an unauthorized publication of notice to the defendant in that suit.

The attachment suit was commenced during a session of the Polk County Circuit Court; the court, at the same session, awarding an order of publication founded upon an affidavit showing that the defendant therein was a non-resident. The plaintiffs insist that this action of the court granting the order of publication was wholly without authority, and therefore void; and that the court could alone grant such order at the return term of the writ. This position is supposed to be sustained by the provisions of section 23, chapter 12, of the Revised Statutes of 1855, which were in force at the time the order was granted.

The statute referred to provides for orders of publication in two classes of cases—one where the order is founded on the affidavit showing certain facts; and the other where the order is founded upon the non-appearance of the defendant at the return term of the writ, his property having been attached, and it appearing that he could not be found. In this latter class of cases no

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affidavit is required, and according to the construction of the plaintiffs it is only in this class of cases that the court is authorized to order publication of notice—the clerk of the court alone, according to this view, being authorized to make the order where it is founded upon an affidavit. The result of this interpretation would be that, where the order is founded on an affidavit it could not be awarded in term time at all; for the clerk has no authority whatever in the premises, except in the vacations of the court. However this view of the provision in question may accord with the grammatical construction of the section, it evidently does not express the intention of the legislature in enacting it. The authority of the clerk, in granting orders, is limited to the vacations of the court, upon the theory and evident supposition that the court, when in session, would have full control and jurisdiction of the subject, and so it must have been intended; and this accords with the general scope of the statute and the nature of the subject legislated upon.

If that is not the true construction, then there is no provision in the attachment act for granting orders of publication, founded on affidavits in attachment suits, during the terms of the court, and the practice act must be resorted to to supply the deficiencies of the former act. The attachment act (R. C. 1855, § 64) provides that, in all cases not therein specially provided for, the proceedings in attachment suits shall conform to and be governed by the law regulating the practice in courts of justice in civil causes; and section thirteen, article five, of the practice act (R. C. 1855, ch. 128, § 13) expressly provides that where the required affidavit is filed, the court shall make the order. This clears the subject of all doubt.

In the General Statutes these various sections, and others bearing upon the same general subject, are combined and condensed into one comprehensive section. (Gen. Stat. 1865, p. 655, § 13.) The law, however, so far as it embraces the subject of the present discussion, was not thereby changed. The section combines and re-enacts what was previously the law, existing in detached sections and under different heads.

At the trial in the Circuit Court, the plaintiffs asked instruc-

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tions declaring the law in accordance with their view of it, as already explained, which the court refused. This action of the court is the only matter complained of as erroneous; and as the complaint is not well founded, the District Court committed no error in affirming the judgment of the Circuit Court, and the judgment of the District Court is consequently affirmed. The other judges con

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THOMAS COOK, Respondent, v. THOMAS S. HACKLEMANN *et al.*,  
Appellants.

1. *Distress warrant — Execution — Sale and deed under.* — Where the State auditor issued a distress warrant (R. C. 1855, p. 1542, § 3 *et seq.*; Wagn. Stat. 1335, § 18 *et seq.*) against a county sheriff for default in payment of public money, and on failure to collect the amount thereof, levy was made on the land of the securities on his official bond, the authority of the sheriff to convey the property to the purchaser will not be presumed from the mere recitals in the conveyance itself. The execution of the bond, the default of defendant, the issue of the warrant, the failure to collect the amount from the principal obligor must be shown *aliunde*. In the absence of a provision similar to that touching the title vested in the grantee in case of tax sales (Wagn. Stat. 1204, §§ 111–12), such recitals in a sheriff's deed, under a distress warrant, are not even *prima facie* evidence of the regularity of the previous proceedings,
2. *Executions — Judicial sales — Executions under distress warrant.* — The act touching judicial sales (R. C. 1855, p. 748, § 56; Wagn. Stat. 612, § 54) has no application to a sale under an auditor's distress warrant.

*Appeal from Third District Court.*

Lindenbower & Sherwood, for appellants.

F. P. Wright, for respondent.

I. The recitals in a deed executed by a sheriff upon a sale under a distress warrant are not *prima facie* or presumptive evidence of the facts therein stated, as they are in a deed made by virtue of an execution upon a judgment. The act concerning executions does not apply to sales made by virtue of distress warrants.

II. It devolved on the defendant to show that McKay, the collector, was a defaulter and delinquent, and also that Cook was a security on the bond, and that he executed that bond.



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*R. F. Butler*, for respondent.

A deed made by a public officer purporting to convey the property of a private individual as an official act, by virtue of statutory power, is never evidence of anything except its own existence, unless made so by express provisions of statute. (*Moreau v. Detchemendy*, 41 Mo. 431; *Bosworth v. Bryan*, 14 Mo. 579; *McCormick v. Fitzmorris*, 39 Mo. 24; *Stierlin v. Daily*, 37 Mo. 483; 2 Johns. 280; *Ronkendorf v. Taylor*, 4 Pet. 349; 2 Washb. Real Prop. 545 *et seq.*) No presumptions are indulged in favor of the acts of public officers in cases like the present. The burden is on the purchaser to make out his title by showing that every prerequisite of the law had been fulfilled, and the acts must be expressly authorized by statute. (*Morton v. Reeds*, 6 Mo. 64; *Reeds v. Morton*, 9 Mo. 878; *Crook v. Peebly*, 8 Mo. 345; *Tanner v. Stine*, 18 Mo. 580; *Blair v. Coppage*, 16 Mo. 495; *Ruby v. Huntsman*, 32 Mo. 501; *Stierlin v. Daly*, *supra*; *Gibbons v. Steamboat Fanny Barker*, 40 Mo. 253; *Moreau v. Detchemendy*, *supra*; 2 Johns. 280; 4 Pet. 349; 2 Washb. on Real Prop. 545-71.)

BLISS, Judge, delivered the opinion of the court.

Plaintiff brought ejectment in the Cedar Circuit Court, and, after showing a chain of title from the United States, the defendant exhibited a sheriff's deed to himself, and gave no other evidence. The deed was executed by L. Davis, as sheriff of Cedar county, and recites that P. B. McKay, sheriff and *ex-officio* collector of said county for the year 1861, failed to pay into the State treasury the amount with which he stood charged upon the State auditor's books as due the first Monday of January, 1862; that the auditor ascertained the balance due to be \$843, and on the 15th of December, 1863, issued a distress warrant in favor of the State and against said McKay, as principal, and his securities upon his official bond, including the plaintiff, directed to John H. Paynter, then sheriff of said county, which was delivered to him June 13, 1864; that said Paynter levied on 240 acres, the real estate in dispute, describing it; and

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after giving twenty days' notice by handbills, on the 20th of March, 1865, in Stockton, at the court-house door, and during the sitting of the County Court, exposed for sale at public auction all the right, title, and interest of said McKay and his five securities, including plaintiff, and naming them, in and to said real estate; that at said sale defendant Hacklemann was the highest and best bidder, at \$120, and it was struck off to him at that sum; that he paid for the same; also, that said auditor, on the 18th of July, 1868, made an order upon said Davis, as sheriff (the said Paynter being dead), to convey said land to said Hacklemann; and thereupon the said Davis, "in consideration of the premises, and in obedience to said order, and by virtue of the authority vested in him by law and the said auditor of public accounts," proceeded to convey the interest of the signers of the bond unto said defendant, etc.

When the deed was offered in evidence, objection was made to it because it was void upon its face; and after the evidence was concluded, the plaintiff asked the court to instruct the jury that the deed was not sufficient to show title in defendant, which the court refused to do, but, at defendant's instance, instructed them that if they believed that sheriff Davis executed the conveyance to defendant Hacklemann in consummation of a sale by his predecessor, Paynter, under a distress warrant from the State auditor against McKay and his securities, they would find for defendant, provided it was sold at either door of the house used as a court-house. No evidence whatever, unless the recitals were evidence, had been given in relation to the sale by Paynter, the distress warrant, or any of the proceedings upon which the deed was based. Waiving for the present the consideration of the alleged irregularities upon the face of the deed, it is certain that of itself it could have no force or effect. It is not a deed of the owner of the land, and the authority to make it should first have been established. If McKay had been sheriff and tax collector, and had proved a defaulter; if he had given a bond upon which the plaintiff was security; if the auditor had issued a distress warrant to the then sheriff under the statute; if such sheriff could not collect the same of the goods and chattels and real estate of the

delinquent, and had in consequence levied upon the property of the plaintiff as security, advertised and sold the same according to law, then we may assume he had a right to make a deed. But this authority will not be presumed unless the law positively requires it. In *ex parte* proceedings, especially those proceedings not expressly authorized by the party against whom they are had, nothing is presumed. There is no judgment concluding all the preliminary facts, there has been no process of law, and everything the law requires in order to charge the property sold remains to be proved. A principle so universally recognized and acted upon, and without which all property would be insecure, needs but to be stated to command assent. Some of these facts, it is true, so far as they concern the action of the sheriff under the warrant, may be proved by his return; and in relation to the whole of them, we need not say what would be competent or sufficient proof, because in this case no proof whatever was offered. They were all assumed as proved by the recitals of the deed—an assumption not warranted by law.

The law under which these proceedings were had (R. C. 1855, p. 1542, etc.) makes no provision in relation to a deed of the property sold, or its effects. And, although in the analogous case of tax sales, the revenue act expressly provides that a "tax deed" shall vest title in the grantee, and be conclusive evidence that the legal preliminaries had been complied with, yet this court held, in *Abbott v. Lindenbower*, 42 Mo. 162, and in accordance with principles, as applied to the subject, that are universally recognized, that, though the Legislature has power to make such deed *prima facie* evidence of the regularity of the previous proceedings, throwing the burden of proof of irregularity upon him who would impeach them, yet they could not make it conclusive or make it pass title when those proceedings were in fact irregular. When there is no judgment to conclude them, they are open to investigation; otherwise property would be taken without due process of law. A similar provision in relation to the effect of a deed upon sale under an auditor's distress warrant might be held to throw the burden of proving irregularities upon the party who resisted it. But,

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without such provision, the one who offers the deed must show that he is entitled to it.

To sustain his view of the legal effect of this deed, the defendant relies upon section 56, p. 748, of the act of 1855, concerning executions, which is the same as the present provision, and contends that the requirement of that section in relation to the recitals, and the provision in relation to their legal effect, apply as well to a sale under the auditor's distress warrant as to judicial sales. That view will not bear a moment's investigation. If it applied to sales like the present, it would also apply to tax sales, and to all sales made by any person who could be called an "officer" under any kind of legal proceedings. The chapter containing the section pertains to executions—a word of plain and single import—and the section itself speaks of the "parties to the execution, and the date of the judgment, order, or decree, etc., as recited in the execution"—clearly and unequivocally referring to an ordinary execution issued upon a judicial judgment, order, or decree, if, indeed, it is not a solecism to suppose there can be a judgment, etc., that is not judicial.

Section 6 of the act then in force (R. C. 1855, p. 1544) provided that "property distrained shall be advertised and sold in such manner and at such time as is prescribed by law for advertising and selling property by virtue of a writ of *feri facias*." A liberal interpretation of this provision might perhaps authorize the sheriff to make a deed of the property sold by him, or upon petition, if sold by his predecessor, as the act makes no express provision in regard to deeds in this class of sales; or we might perhaps say that when the law directs an officer to make a sale of land, it would imply the right or duty of conveying in pursuance of the sale. But it is not necessary at present to decide these questions, as there was manifest error in the effect given by the Circuit Court to the deed under consideration.

The judgment of the District Court, reversing that of the Circuit Court, is affirmed and the cause remanded. The other judges concur.

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Fitch v. The Pacific R.R. Co.

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WILLIAM FITCH, Plaintiff in Error, v. The PACIFIC RAILROAD  
COMPANY, Defendant in Error.

1. *Railroads — Damages — Burning fences, etc. — Negligence may be inferred, when — Contributory negligence will not excuse defendant, when.*— In an action against a railroad company for setting fire to plaintiff's fences, corn fields, etc., by sparks from its locomotive, *held* as follows:

First. The jury, in order to charge the company, must find affirmatively that the fire escaped from the smoke-stack through the negligence of its agents or servants. But when it is found that fire has been scattered by the engine along its track, with no explanation of the cause, the jury is warranted in inferring some negligence in the company. To rebut that inference, defendant should show that the best machinery and contrivances were used in the particular case at bar to prevent the fire, and that competent servants were employed.

Second. If the conduct of defendant's agents was the immediate and direct cause of the injury, and if, with the exercise of prudence and the use of proper appliances on their part, the result might have been prevented, the defendant would not be excused, even though the proof showed some remote negligence in the plaintiff, as that he carelessly left grass in the fence corners adjacent to the road, whereby the fire was kindled. Such carelessness was not the proximate cause of the loss, and was not such contributory negligence as would excuse defendant.

*Error to First District Court.*

*Elliot & Blodgett*, for plaintiff in error.

The plaintiff having shown that the fire originated from sparks escaping from defendant's engine, the burden of proof was on the defendant to show that the engine from which the sparks escaped was, at the time, equipped with the most improved mechanical contrivances employed to prevent the escape of fire. (Ill. Cent. R.R. v. Mills, 42 Ill. 410; McClelland v. Ill. Cent. R.R., 42 Ill. 354. See also opinion of Illinois Supreme Court in case of O. & M. R.R. Co. v. Shanafelt, not yet published.)

*Crittenden*, and *Cockrill*, for defendant in error.

I. If plaintiff, by permitting inflammable matter to grow and remain on his premises adjacent to those of defendant in error, contributed to his loss, he can not recover. It is enough to defeat him if the injury might have been avoided by the exercise of ordinary care upon his part. (Wild v. Hudson River R.R. Co.,

## Fitch v. The Pacific R.R. Co.

24 N. Y. 430; Johnson v. Hudson River R.R. Co., 20 N. Y. 65-73; Button v. same, 18 N. Y. 248; Munger v. Tonawanda R.R. Co., 37 Barb. 516; Mangum v. Brooklyn R.R. Co., 36 Barb. 230; 33 Barb. 429. See also 32 Barb. 657, 398; 31 Barb. 419; 27 Barb. 221; 14 Barb. 585, 364; 13 Barb. 493; 8 Barb. 368; 21 Wend. 188; Owen v. Hudson River R.R. Co., 2 Bosw. 374; 10 Bosw. 216; Clark v. Kiowan, 4 E. D. Smith, 21; Wetherby v. Regent's Canal Co., 12 C. B., N. S., 2; Tuff v. Warman, 5 C. B. 573; 15 Ill. 585; 16 Ill. 300; 42 Ill. 288; 2 Ill. 748; Walton v. London & Brighton R.R. Co., 1 Harr. & Ruth. 424; 10 Mich. 193; 31 Mo. 375; 42 N. H. 197; 51 Penn. 240; 24 Penn. 465; 1 Verm. 353; 8 Verm. 264; Cleveland, Columbus & Cincinnati R.R. Co. v. Terry, 8 Ohio St. 570; 15 Ind. 587; Shearm. & Redf. Neg. §§ 25, 32 and cases cited; opinion of Judge Gould in the case of Wild v. Hudson River R.R. Co., 24 N. Y. 430, and the O. & M. R.R. Co. v. Shanafelt, — Ill. —.) The degree of the defendant's negligence is immaterial in determining questions of contributory negligence. (Catawissa R.R. Co. v. Armstrong, 49 Penn. 186; 23 Conn. 437; 24 N. Y. 430.) In 24 Verm. 487-496, it was decided that in cases of mutual neglect, where it is of the same character and degree, no action can be sustained. (18 Mo. 365; 36 Mo. 351; 19 Mo. 192; 31 Mo. 412; 1 Redf. on Railw. 330, § 150.)

II. Plaintiff has shown no diligence in protecting his property against the obvious dangers of fire unavoidably issuing from the locomotives of defendant whilst it was engaged in a lawful business. The injured person must have used care proportioned to the danger to be avoided. (Mackey v. N. Y. Cent. R.R. Co., 27 Barb. 528-542; 20 N. Y. 492; 8 Barb. 368; Shearm. & Redf. Neg. 34, § 34; 30 Penn. St. 454; 36 Mo. 487; 17 Barb. 94; 6 Cush. 292; Shearm. & Redf. Neg. § 5.)

III. Plaintiff having charged in his petition that the burning of the corn and fencing was negligently done by the defendant, it must be shown affirmatively as a matter of fact—not one of presumption. (1 Allen, Mass., 187; 37 Md. 287; 20 N. Y. 65; 62 Barb. 165; 2 Am. R.R. Cases, 325-30; 44 Ill. 460; 18 Barb. 80.)



BLISS, Judge, delivered the opinion of the court.

The plaintiff charges defendant with negligently and carelessly, and for want of due care and prudence in running its locomotives and cars, setting fire to and burning up his fences and corn fields, etc. Defendant joined issue, and judgment was recovered by the plaintiff in the Johnson Court of Common Pleas, which was reversed in the District Court.

At the trial, the plaintiff gave evidence tending to prove that the fires were kindled by sparks from the smoke-stacks of defendant's engine; that an unusual amount of smoke and sparks were emitted at the time; that the fire caught near the railroad track, in the dry grass, and also in the plaintiff's contiguous inclosure, and ran through his field and burned up his fences; that one of defendant's engines which ran that season upon this road was without the usual and suitable screens upon the smoke-stack to prevent the escape of fire, and that fire had frequently caught near the track from that engine; but it did not affirmatively appear that the fire was kindled by that engine, or that it was running at the time. The defendant gave evidence tending to prove that the company used the best machinery and contrivance to prevent the escape of sparks; that its engines always left the stations in good condition; that the fissures in the fire screens were about one-eighth of an inch in width; that the small sparks that could escape through these are not dangerous, and could not fire the grass; and that the engineers employed were competent and careful. Evidence was also given tending to show that both in the plaintiff's field near the railroad, and also inside of the railroad fence, there was dead grass, which was easily ignited. The court gave to the jury all the instructions requested by defendant's counsel, and also gave several instructions asked by the plaintiff, to which exceptions were taken.

It is unnecessary to comment in detail upon all these instructions, as the points raised and relied upon by defendant's counsel can be more briefly considered. The defendant denies, first, that negligence was proved, and claims that if the fire was kindled by its engine, as charged, still inasmuch as the dry grass was per-

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mitted by the plaintiff to remain in his field and fence corners, which became food for the fire and contributed to the damage, it was such contributory negligence as should exonerate it from liability. It can not claim absolute misdirection in charging the jury on this point, for its positions were all given them in general terms, as the law of the case; but it does claim that the instructions given on behalf of plaintiff were not sufficiently qualified by directing attention to the true doctrine. The jury could hardly have been deceived as to the views of the court upon the subject, nor would the facts in this case have warranted a finding for defendant upon this ground alone.

There have been by no means such clearness and precision, or even uniformity, in the multitude of decisions upon this subject, in our sister States, as to leave the matter free from doubt. All agree that the plaintiff's fault must proximately contribute to the injury in order to constitute any ground of defense, but the precise meaning attached to the term is not always made clear. (See cases cited in Shearm. & Redf. on Negligence, §§ 33-5, pp. 382-3.)

The relation to the injury is not one of time or space, and it is not easy to give such perfect definitions as shall apply to all cases. Yet, as injuries from mutual negligence arise, it is seldom difficult to fix upon the proximate cause. The natural reason—our judicial instincts—seize at once upon it and separate it from those more remote, although the injury could never have been inflicted without the latter.

Light may be thrown upon the question by applying the old distinction between causes and instruments, making the remote causes but the instruments, in the scholastic sense, through which the direct causes could operate. And no better illustration of this distinction can be given than the case at bar. The plaintiff's fences and corn were destroyed by the fire kindled by defendant's engine. Assuming that the kindling of this fire was the result of defendant's negligence, that negligence was the proximate cause of the destruction. But the fire, it is assumed, would not have destroyed the plaintiff's property had he kept his fields and fence corners thoroughly free from dried grass and herbage.

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This fuel, then, thus in part furnished by the plaintiff, was the remote cause — the instrument through which the defendant's negligence was enabled to do the mischief.

The modern decisions in our own State have contributed to remove the ambiguity. *Huelsenkamp v. Citizens' Railw. Co.*, 37 Mo. 537, is the leading case, and in it the authorities are reviewed, and the kind of contributory negligence that will excuse a defendant is defined as applied to passenger carriers (see p. 549). The more recent case of *Morrissey v. The Wiggins Ferry Co.*, 43 Mo. 480, affirms the former decision and restates the rule to be "that the carrier shall be guilty of some negligence, which mediately or immediately produced or enhanced the injury, and that passengers should not have been guilty of any carelessness and imprudence which directly contributed to the injury, since no one can recover for an injury of which his own negligence was, in whole or in part, the proximate cause; and that, although the plaintiff's misconduct may have contributed remotely to the injury, if the defendant's misconduct was the immediate cause of it, and, with the exercise of prudence, he might have prevented it, he is not excused." We have only to apply the rule to cases like the one at bar, so far as their different character will permit.

Firstly, the jury, in order to charge the defendant, must find affirmatively that the fire escaped from the smoke-stacks of its engines, through the negligence of its agents or servants. (*Smith v. Hann. & St. Jo. R.R. Co.*, 37 Mo. 287.) The burning, the damage, the escape of the fire, and the negligence, are all facts to be charged and proved. But they must be proved, like all other facts, by such evidence as shall satisfy a reasonable mind of their existence. It is sometimes said that negligence is presumed from the escape of the fire. (*Ill. Cent. R.R. Co. v. Wells*, 42 Ill. 407.) But, while this can hardly be called a presumption, as the term is generally used, it may be a fair and reasonable inference. The language of Judge Holmes, in *Smith v. Hann. & St. Jo. R.R. Co.*, 295, is very strong, and liable to misconstruction unless compared with the case and the rest of the opinion. If the plaintiff were required to prove affirmatively and specifically the condition of the particular smoke-stack from

which the fire escaped—if he were bound to show the specific negligence that permitted its escape—it would be equivalent to denying him relief altogether. The farmer, along whose fields the train flies, from the nature of the case, can know nothing about these things. He can not know the engine, nor can he tell the contrivances needed, used, or neglected. All that he can in most cases show is that the fire escaped and destroyed his property. It is an inference of reason that fire should not so escape. When as dangerous, as well as useful, an instrument of locomotion as a steam locomotive is used, its managers are bound to a care and precaution commensurate with the danger. They have a right to use the instrument, but have no right to scatter fire along their track; and when it is found that this is done, with no explanation of the cause, the jury is warranted in inferring that there has been some neglect. To rebut that reasonable inference, the defendant should show that the best machinery and contrivance were used to prevent such a result, and that careful and competent servants were employed. (Vaughn v. Taffvale R.R. Co., 3 Hurlst. & N. 743; same case on review in 5 Hurlst. & N. 679; Freemantle v. London & N. W. Railw. Co., 10 C. B., N. S., 89.)

Secondly, as to contributory negligence, if the plaintiff was guilty of some act or negligence that directly or immediately caused the result, he can not recover, notwithstanding the neglect of defendant. But if the plaintiff's neglect was slight or remote, and if the conduct of defendant's agents was the immediate and direct cause of the injury, and if, with the exercise of prudence and the use of proper appliances on their part, the result might have been prevented, the defendant is not excused.

In our view of both these propositions, the instructions were sufficiently full, and the verdict is warranted by the evidence. As to the negligence of defendant, the plaintiff made more than a *prima facie* case; for he not only proved the unusual escape of fire, but he also proved that an imperfect engine was used on the road, although it was impossible for him to show that it was the one that set the fire. On the other hand, the defendant, whose servants had charge of the engine, proved nothing in

regard to this particular one that set the fire, but did show general good management in regard to the smoke-stacks, which might be true and consistent with negligence in a specific instance. As to the fact of contributory negligence, the evidence shows that the grass along the fence separating the plaintiff's farm from defendant's road was left in its natural condition, and of course some combustible material accumulated in consequence. It is claimed that because of this accumulation the fire was fed and made sufficiently strong to do the injury complained of; that thus the plaintiff contributed to it, and, consequently, can not recover.

But the neglect charged can not be called the cause of the loss. The words "directly and immediately" are not used to denote time in the chain of the causation, but rather efficiency. An idea of necessity is always involved in the relation of cause and effect. Both parties carelessly left upon the ground the materials for the fire; but it was the fire, and not the materials, that burned the fences. There is a necessary connection between kindling the fire and the combustion; we can not help associating them as cause and effect; but we can not logically call the accumulation of grass the cause. I have spoken of it as the instrument; it might be styled the remote cause; it certainly was not the efficient moving cause, or rather *the* cause. The careless leaving of the dead grass upon the ground was not, then, the proximate cause of the loss, and was not such contributory negligence as will excuse that of defendant.

Had the charge been that by accident, and without negligence, fire was kindled in the dry grass along defendant's road, and in consequence of negligence in not removing the grass, and in suffering such combustible material to accumulate, the fire spread and ran into plaintiff's inclosure, burned his fence, etc., it would then, I conceive, be competent for defendant to show that the plaintiff had also suffered a similar accumulation, and that without it he would have suffered no injury. Both causes were equally remote, and the proximate cause was an accident. We are referred by defendant's counsel to a newspaper report of a decision of the Supreme Court of Illinois in *Ohio & Mississippi Railway Co. v.*

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Shanafelt, not yet published, but it goes no further than this: no negligence was charged or attempted to be proved against the company in setting the fire—only in not removing the grass. The parties were equally negligent, and in the same matter precisely, and one could not with a good face charge the other with a specific neglect of which he was also guilty. But the case at bar is entirely different. Without saying that any negligence in relation to the grass was in fact established, the jury might without error have been told, as they were not, that the fact that the natural growth of the year previous had not been removed was no excuse for setting it on fire. The wrongful act of kindling the fire is the proximate cause of the injury, and not the neglect of cleaning up the fence corners, of which, unfortunately, most of our farmers are guilty.

The defendant has no reason to complain of the instruction in this regard, and the judgment of the District Court, reversing that obtained by the plaintiff below, is reversed. The other judges concur.

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THE STATE OF MISSOURI, Defendant in Error, v. AUSTIN BRANNON, Plaintiff in Error.

1. *Practice, civil—Jury, separation of, will not invalidate a verdict, when.—*

It is the well-settled doctrine in this State that the separation of a jury in a criminal case will not invalidate a verdict or furnish grounds for a new trial, there being no ground to suspect that they have been tampered with or that they have acted improperly.

*Error to First District Court.*

*A. Budd, for plaintiff in error.*

In capital cases a jury can never be permitted to separate. (1 Bishop on Crim. Procedure, §§ 821, 822, 824; 11 Howard's State Trials, 562, 563, 564; 19 Howard's State Trials, 671, note 11; McClean v. State, 8 Mo. 153; Maher v. State, 3 Mo. 444; Kernan v. State, 8 Wis. 132; Madden v. The State,



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1 Kansas, 340; Quinn v. The State, 14 Ind. 589; Jumpertz v. The People, 21 Ill. 375; Puffer v. C. W., 15 Penn., 3 Harris, 468; Hare v. The State, 4 Howard, Miss., 187; Commonwealth v. Wormley, 8 Gratt., Va., 712; Bowles v. The State, 13 S. & M., Miss., 398; Hines v. The State, 8 Humph., Tenn., 646; State v. Prescott, 7 N. H. 287; Wesley v. The State, 11 Humph., Tenn., 502; Browning v. State, 33 Miss. 47; 1 Bishop on Crim. Procedure, §§ 424, 827; State v. Mansfield, 41 Mo. 470.)

*H. B. Johnson*, Attorney-General, for defendant in error.

It is competent for a judge, when trying a capital or other felony, to permit the separation of the jury during the progress of the trial, and a conviction is not vitiated thereby unless such separation is shown to have been accompanied by some abuse prejudicial to the accused. (State v. Whitney, 8 Mo. 165; State v. Mix, 15 Mo. 153; State v. Burton, 19 Mo. 227; State v. Barlow, 21 Mo. 446; State v. Igo, 21 Mo. 459; Stephens v. People, 19 N. Y. 549; State v. Ryan, 13 Minn. 378; Sargeant v. State, 11 Ohio, 474; State v. Ingles, 13 Ohio, 492; Davis v. The State, 15 Ohio, 72; Evans v. The State, 7 Ind. 271; State v. McKee, 1 Bailey, S. C., 651; State v. Anderson, 2 Bailey, S. C., 565; State v. Babcock, 1 Conn. 401; People v. Douglas, 4 Conn. 26; McCrary v. Com., 5 Casey, 223, 227; Rex v. Rennear, 2 B. & Ad. 462; 1 Bish. Crim. Proc. § 828.)

WAGNER, Judge, delivered the opinion of the court.

The defendant was tried at the October term, 1868, of the Johnson County Circuit Court, on an indictment for murder, and convicted of murder in the second degree and sentenced to the penitentiary.

The only point made in favor of a reversal is that the jury, after they were impaneled and sworn, were permitted to separate. This separation was by consent of parties before any evidence was introduced, and for one night only. To say nothing about the consent given to the separation by the defendant himself, it is the well-settled doctrine in this State that the separation of a jury in a criminal case will not invalidate a verdict or furnish

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grounds for a new trial, there being no reason to suspect that they have been tampered with, or that they have acted improperly. (Whitney v. State, 8 Mo. 165; State v. Mix, 15 Mo. 153; State v. Barton, 19 Mo. 227; State v. Igo, 21 Mo. 459.) And the law has been held the same where the accused was on trial for murder. (State v. Harlow, 21 Mo. 446.)

Judgment affirmed. The other judges concur.

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Ex parte CHARLES TURNER.

1. *Practice, criminal — Convictions — Sentences — Terms of imprisonment — Construction of statute.*—On the same day a prisoner was convicted and sentenced under two indictments. The sentences were pronounced after the verdicts in both cases had been rendered. The terms of imprisonment were, respectively, three and two years, but the day when they were to begin was not specified. *Held*, that the statute (Wagn. Stat. 513, § 9), without the aid of such specification, makes the second term commence on the expiration of the first, and *habeas corpus* for his discharge at the end of the first term, on the ground that the second and shorter term had already elapsed, will be denied.

*Petition for habeas corpus.*

Lay & Belch, for petitioner.

H. B. Johnson, Attorney-General, for respondent.

BLISS, Judge, delivered the opinion of the court.

Charles Turner, an inmate of the penitentiary, applies for a writ of *habeas corpus*, and represents that he is imprisoned under two sentences of the Criminal Court—one for three and one for two years, the period of the first having expired. Both judgments were rendered upon the same day, and after the convictions in both cases, and their terms are alike and general, neither of them specifying the time when the imprisonment should commence. The following is the language of the statute under which the officers of the State claim the right to hold the prisoner during his second term: "When any person shall be convicted of two or more offenses, before sentence shall have been pronounced

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upon him for either offense, the imprisonment to which he shall be sentenced upon the second or other subsequent conviction. shall commence at the termination of the term of imprisonment to which he shall be adjudged upon prior conviction." (Wagn. Stat. 513, § 9.)

In *Ex parte* Meyers, 44 Mo. 279, this court held that a prisoner could not be held upon his second term of imprisonment when judgment was pronounced after conviction and sentence upon the first term. For an exposition of the above section and of the duty of the court under it, see that case and cases therein cited.

The prisoner, Turner, now claims that inasmuch as the judgments under which he is and has been confined do not specify the time when the imprisonment should commence, each term should be held to begin at the same time, and consequently that he has served his full period. But the statute does not require it, and it is not the practice for each sentence to specify the day of the commencement of the imprisonment. He is sentenced, and the time of imprisonment is designated according to the assessment by the jury, and the law decides when the term shall commence; and when he is convicted and sentenced for two offenses, the law also expressly decides when the second term shall begin, and it is wholly unnecessary for the court to decide it. The court can not do so with any certainty, for the prisoner may be discharged by pardon or otherwise from his confinement under the first conviction, and in that case the second term should at once begin.

The writ is refused. The other judges concur.

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D. M. JAMESON, Appellant, v. THE STATE AND WEBSTER COUNTY, Respondents.

1. *Practice, civil—Supreme Court—Exceptions must be saved below.*—When no exceptions are taken to the rulings of the court below, they will not be considered on appeal to this court.

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*Appeal from Third District Court.*

*McAfee & Phelps*, for appellant.

*Johnson & Budd*, for respondents.

CURRIER, Judge, delivered the opinion of the court.

It appears from the record that Jameson petitioned the Webster County Court to be relieved from the payment of certain taxes, alleging certain facts which he claimed entitled him to exemption. Not being satisfied with the action of the County Court, he has brought the case here by successive appeals through the Circuit and District Courts.

We are referred to no law authorizing these proceedings, but have nevertheless looked into the record, and find that no question is saved for review in this court. No exception appears to have been taken to any of the rulings of the Circuit Court on the trial there. No instructions were asked or given, nor was there any exception taken to any action of the court in admitting or excluding evidence.

The judgment will be affirmed. The other judges concur.

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F. D. MERS, Defendant in Error, v. A. J. BELL, Plaintiff in Error.

1. *Sales — Sheriff's, at Circuit Court-house door, during session, are valid, etc.* — Judgment was obtained in the Common Pleas Court of Cass county, while in session at Pleasant Hill, and execution was issued therefrom. But the sale by the sheriff was made at the court-house door of the Circuit Court, at Harrisonville, the county seat, during a term of the Circuit Court, and not at the place where the Common Pleas Court was held, nor during a session thereof: *Held*, that, under the statute concerning judicial sales (Wagn. Stat. 609, § 42), such sale was valid.

*Error to First District Court.*

*Johnson*, and *Budd*, for plaintiff in error.

The sale should have been made at Pleasant Hill, where the court out of which the execution issued was held, and during the

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session thereof. (Blanchard v. Baker, 29 Mo. 441 ; Sess. Acts 1851, p. 203 ; Sess. Acts 1867, p. 85.)

*H. H. Harding*, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

The origin of this cause was a motion to set aside a sale made under execution issued out of the Common Pleas Court of Cass county, upon a judgment obtained while sitting at Pleasant Hill. The sale was made by the sheriff, at the court-house door, at Harrisonville, the county seat, during a term of the Circuit Court, and not at the place where the Common Pleas was held, or during a session thereof.

The motion was sustained and the sale set aside on the ground that the sale should have been made at the place where the court out of which the execution issued was held, and during its session. This ruling of the Common Pleas Court was affirmed, on appeal, in the Circuit Court, but the judgment of the Circuit Court was reversed in the District Court. It will be perceived, therefore, that there is but one question in the record, and that is whether the sale made by the sheriff at the court-house door, whilst the Circuit Court was in session, was valid.

The act establishing the Court of Common Pleas in Cass county provides that it shall hold four terms a year—two at the county seat of the county, and two at the town of Pleasant Hill ; and it declares that judgments rendered by said Common Pleas Court shall be liens on all real estate situated in said Cass county, and with like effect as judgments of the Circuit Court, and shall be proceeded upon to execution and sale in the same manner as is prescribed by law for judgments in the Circuit Court. The act further makes it the duty of the clerk of the Common Pleas Court, after the adjournment of each term, to enter upon the records of the Circuit Court a list of all judgments rendered at such term. The sheriff of the county is the officer provided to attend the sittings of the Common Pleas Court, and to execute its process. (See Acts 1867, pp. 86-7.)

No provision is anywhere made in the act organizing and

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establishing the court for the sale of real estate, as to where or when, or at what particular time or place, the sale shall take place. The only direct reference to the subject is the seventh section, where it is said that the judgments of the Common Pleas Court shall be proceeded upon to execution and sale in the same manner as is prescribed by law for judgments in the Circuit Court. Now, the statute provides that when real estate shall be taken in execution by any officer, it shall be his duty to expose the same to sale at the court-house door, on some day during the term of the Circuit Court of the county where the same is situated. (1 Wagn. Stat. 609, § 42.) This is the general rule, and is founded in justice and wisdom. The sessions of the Circuit Court attract people from all parts of the county, and sales at the court-house whilst that court is holding its term, conduces to competition in bidders.

The people know that sheriffs' sales generally take place at the court-house during the sessions of the Circuit Court, and they go there at that time for the purpose of seeing what property is to be sold, and to make purchases. Again, they look for the advertisements and notices of sale, when the sales are to take place at the court-house in term time, because they are expected; when a sale at another time, in a different town, before an inferior tribunal, would escape the observation of all except those who were specially interested.

Unless an express grant of power can be shown, or the implication is so strong that there can be no reasonable doubt entertained as to the intention, the general provision of the statute regarding judicial sales ought to be adhered to, and should not be modified or nullified by the courts. The language of the act declaring that sales should be made in the same manner as prescribed by law upon judgments in the Circuit Court, had, I think, direct reference, and was intended to make them conform in regard to time and place, to sales by sheriffs generally, when acting under executions.

The counsel for plaintiff in error have cited and rely upon the case of *Blanchard v. Baker*, 29 Mo. 441; but that case can not be held to be authority here. It was based upon a construction



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of the act establishing the Weston Court of Common Pleas, which is totally dissimilar to the one we are now considering. I am of the opinion that the judgment of the District Court was correct, and should be affirmed.

Judgment affirmed. The other judges concur.

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ADAM F. TRAINER, Presiding Justice of the Montgomery County Court, Petitioner, v. GILCHRIST PORTER, Judge of the Montgomery County Circuit Court, and THOS. J. POWELL, Respondents.

1. *County Court, acting judicially, not subject to the control of the Circuit Court — Mandamus — Prohibition, at whose instance will lie.*—It is the settled doctrine that where the County Court acts judicially, as on its disapproval of an administrator's sale, the Circuit Court can not control its judgment. And in case of *mandamus* from the Circuit Court to compel the County Court to approve such sale, a writ of prohibition against the former will properly lie, for the reason that, although the Circuit, by its process, obtained jurisdiction of the party, it acquired none over the subject-matter of the action of the County Court; and the writ of prohibition may issue against it at the instance of any one of the parties, or even of a stranger.

*Petition for writ of prohibition.*

*Dryden, Lindley & Dryden*, with *Sanders & Carhner*, for petitioner.

I. *Mandamus* will not lie to compel an inferior tribunal to give a particular judgment, or to reverse a decision where it has once acted. (State *ex rel.* Adamson v. Lafayette County Court, 41 Mo. 224-5; *ex parte* Jesse Hoyt, 13 Pet., Sup. C. U. S., 289-90; *Ex parte* Myra Clark Whitney, 13 Pet. 407-8; *Ex parte* Taylor, 14 How., U. S., 12-13; *Ex parte* Koon, 1 Denio, 645-6; Elkins v. Athearn, 2 Denio, 192-3; The People v. The Judges of Dutchess Common Pleas, 20 Wend. 659; Chase v. Blackstone Canal Co., 2 Pick. 244.)

II. The functions of the County Court in matters pertaining to their probate jurisdiction are judicial. (Miller v. Iron County,

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29 Mo. 122; Jones v. Brincker, 20 Mo. 88; State, use of, &c., v. Roland, 23 Mo. 98; West v. Clark County Court, 41 Mo. 49; Strouse v. Drennan, 41 Mo. 296-7; Wilson v. Brown's Adm'r, 21 Mo. 410; Speck v. Wohlien, 32 Mo. 130-1; Marion County v. Phillips, decided at last October term, but not yet reported; Tyler's adm'r v. Von Dembusch's adm'r, 42 Mo. 391; Roberts v. Casey, 25 Mo. 585; Bank & Harrolds v. White *et al.*, 23 Mo. 348; Speck v. Wohlien, 22 Mo. 317; Strouse v. Drennan *et al.*, 41 Mo. 298.)

III. Even if the duty imposed upon the County Court to approve or reject was held to be administrative and not judicial, still, as the discharge of the duty involves the exercise of discretion and judgment, *mandamus* would not lie to direct that discretion and judgment when once exercised, nor to revise or reverse it if unsoundly exercised. (Dunklin County v. District Court of Dunklin County, 22 Mo. 454; U. S. v. Guthrie, 17 How. 284; Moses on Mandamus, 78; Shepherd's note to Fish v. Weatherwax, 2 Johns. Cas. 217.)

IV. If the Circuit Court has no jurisdiction to proceed by *mandamus*, then prohibition will clearly lie to restrain it in its unlawful attempt to exercise jurisdiction. (Thomas v. Mead *et al.*, 26 Mo. 246; State *ex rel.* West v. Clark County Court, 41 Mo. 41; Vitt v. Owens, 42 Mo. 512.)

V. The petition for prohibition may come as well from a stranger as from one in interest. But in this case it does not come from a stranger. (Thomas v. Mead *et al.*, 36 Mo. 247, and authorities there referred to.)

*Thos. J. C. Fagg*, with *E. M. Hughes*, for respondent.

I. That the granting of a prohibition in any case is a matter of discretion. (7 Bac. Abr. 206, and authorities there cited; 1 Bos. & P. 115; 41 Mo. 40.)

II. A writ of prohibition will not be granted in any case where it is apparent that the subordinate tribunal has jurisdiction of the subject-matter. (7 Wend. 518; 4 Bibb, 394.)

III. It does not appear from the suggestions that upon a final hearing before that court that it will assume jurisdiction in the

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premises and issue a peremptory *mandamus*, if it appears that the parties in interest can then bring the whole matter up in a regular way by appeal or writ of error. (Gen. Stat. 1865, p. 550; 9 Mo. 117; 38 Mo. 300; 41 Mo. 50; 42 Mo. 514.)

IV. This court will not, upon the suggestion of a mere stranger in interest, grant a writ of prohibition.

CURRIER, Judge, delivered the opinion of the court.

This is an application for a writ of prohibition forbidding the further entertainment or prosecution of the proceedings therein described.

The petition shows that one Talbott, late of said Montgomery county, died seized of a large amount of real estate, situated in that county, and that his personal assets were insufficient to pay his debts; that one Pittman was appointed by the County Court of Montgomery county to administer upon said Talbott's estate; that said Pitman, subsequent to his appointment, and in all respects in due conformity to law, advertised and sold at public vendue certain of said decedent's real estate, and that the defendant Powell became the purchaser thereof at such sale, being the highest and best bidder therefor, and that he duly complied with all the terms and conditions of said sale; that said administrator thereupon reported the sale, and all his proceedings in the premises, to said Montgomery County Court for confirmation; that the court, at its November term, 1869, took the same into consideration, and being fully advised in relation thereto, declined to approve the sale, and by its consideration and judgment affirmatively disapproved the same.

The petition then proceeds to show that the defendant, Gilchrist Porter, judge of the Circuit Court of said county, upon the application of the other defendant, setting out and showing the facts aforesaid, on the 25th of November, 1869, issued his writ of *mandamus*, directed to said County Court, and commanding it to approve said sale, or show cause for its failure to do so, at the then next succeeding April term of said Circuit Court; that said *mandamus* proceedings are still pending, and that the same

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greatly embarrass the progress of business in said County Court and obstruct the administration of justice therein.

The petition is demurred to, and the facts therein recited thereby admitted to be true. The question is therefore presented whether the petition, upon its face, makes a case which will justify this court in prohibiting the further prosecution of the *mandamus* proceedings complained of; and this raises the further inquiry whether the Circuit Court has jurisdiction of the cause pending before it—namely: the *mandamus* suit.

It is not questioned that the Circuit Court possesses a superintending control over the County Court, and that it may, by its process of *mandamus*, in proper cases, require the latter to proceed with the business before it, and act thereon. It has, however, no authority to determine for the County Court what judgment it shall render, or to require it to reverse its decisions, in matters of judicial cognizance after it has once acted. It is the settled doctrine on this subject that when the subordinate tribunal acts judicially, it must be left free to exercise its best judgment, and that the superior court has no authority to dictate to the former its judgments. (State *ex rel.* Adamson v. Lafayette Co., 41 Mo. 224; Elkins v. Athearn, 2 Denio, 192; People v. Judges of Dutchess Co., 20 Wend. 659, and see the cases cited in the opinion of the court.)

That the County Court acted judicially in its disapproval of the administrator's sale, is not disputed. (See State *ex rel.* West v. Clark County Court, 41 Mo. 49, and cases cited.) It is urged, however, that the Circuit Court acquired jurisdiction of the subject-matter of the *mandamus* suit pending before it, and that this court ought not, therefore, to inquire into the manner in which that jurisdiction is being exercised. This proposition contains an erroneous assumption. The court, by its process, acquired jurisdiction of the party, but not of the cause of action, to-wit: the action of the court in disapproving the administrator's sale. That was the *gravamen* of the complaint, and the Circuit Court, as we have seen, had no jurisdiction of it whatever.

It is further insisted that the writ of prohibition ought not to issue for the reason that the proceedings of the Circuit Court may be reviewed in this court, through the medium of successive

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appeals or writs of error; and that it does not yet appear what action the Circuit Court may finally take in the premises. These suggestions merited consideration prior to the issue of the preliminary writ; but that writ was ordered, and the case is now here, and may as well be disposed of upon its merits, so that the County Court may at once proceed with its appropriate business.

It is further suggested, as an objection to these proceedings, that the complainant has no personal interest in the contest—that he is a mere stranger to the litigation. If the fact were so, that would not necessarily dispose of the case. In *State ex rel. West v. Clark County Court*, 41 Mo. 49, the judge delivering the opinion of the court says that a prohibition may issue against a court acting without jurisdiction, at the “instance of any one of the parties, or even of a stranger,” and cites 36 Mo. 232; 38 Mo. 296; 5 East. 345; 1 Bay, 382; 2 Metc. 296; 23 Ala. 94; 1 Hill, 201. But the presiding justice of the Montgomery County Court, against whom the *mandamus* proceedings are pending, can hardly be regarded as a “stranger” to the controversy. He is a party to it.

Peremptory writ ordered. The other judges concur.

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WM. H. BOWEN, Plaintiff in Error, v. WM. HIXON, Defendant in Error.

1. *Election—Contest—Count of votes, final—Term of notice—Mode of contest in certain case by quo warranto.*—Within eight days after an election, the county clerk, under the statute touching elections (Wagn. Stat. 569, § 25), proceeded to cast up the votes, and gave a certificate of election to A. Afterward, B. giving notice that he would contest the election, he made a second count and gave a certificate to B. Within twenty days after the second count, but more than twenty days after the first, A. also gave notice that he would contest the election. *Held*, 1st, that the duty of the clerk was simply ministerial, and when finished was wholly performed, and that the second count of votes and award of certificates was invalid and null; *a fortiori*, if made after the eight days had expired, and the matter had been removed by notice of contest to the Circuit Court; 2d, that the requirements of the statute concerning twenty days' notice (Wagn. Stat. 573, § 52) was imperative, and that the notice was insufficient, not having been given within twenty days from the first count; 3d, that the proper remedy in such case is by *quo warranto* in the Circuit Court.

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*Error to First District Court.*

*Ewing & Smith*, for plaintiff in error.

*Johnson & Budd*, for defendant in error

I. A notice to contest the office of county clerk must be made within twenty days after the official count of the votes cast for such office has been made. (Gen. Stat. 1855, ch. 2, § 52; Castello v. St. Louis Circuit Court, 28 Mo. 259; Wilson v. Lucas, 43 Mo. 290.)

II. The first count made within eight days after the election was the official count, and after that count was made the board of canvassers was *functus officio*, and the second count was utterly void. (Gen. Stat. 1855, ch. 2, § 5; Ingerson v. Berry, 14 Ohio St. 321; People *ex rel.* Bailey v. The Supervisors of Greene, 12 Barb. 217; State *ex rel.* Attorney-General v. Hixon, 41 Mo. 210.)

III. Notwithstanding Hixon held by virtue of a certificate and commission derived from proceedings which were in themselves void, still he has a *prima facie* right to the office, and is entitled to hold under his commission until ousted by the government, or a better title is shown in accordance with the requirements of law. The fact that Bowen could not know until more than twenty days after the official count that it was necessary to contest can not change the positive provision of the statute. (Wilson v. Lucas, 43 Mo. 290.)

IV. Notwithstanding Bowen's right to contest the election was defeated by the means and time of Hixon's getting possession of the office, still he had his remedy by an information in the nature of a *quo warranto* at his relation.

BLISS, Judge, delivered the opinion of the court.

At the general election of 1866, plaintiff and defendant were candidates for the office of county clerk. The record shows that within eight days after the election the county clerk, taking to his assistance two justices of the County Court, proceeded to examine and cast up the votes given for the candidates, and gave



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a certificate of election to the plaintiff, Bowen. Within twenty days from this official count, Hixon gave him notice that he would contest his election; and it appears that on the 24th of December, after the twenty days had expired, and before the session of the County Court where the contest was to be had, the clerk, again taking to his aid two justices of the County Court, made another canvass, and gave a certificate to defendant, Hixon, who received a commission from the governor and took possession of the office. The plaintiff then gave defendant notice that at the next term of the County Court he would contest his right to the place, which notice was served on the 4th of January, 1867, over fifty days after the first, and some ten days after the second count. At the session of the County Court the defendant moved to dismiss the proceedings for want of proper notice, which motion was overruled, whereupon he suffered judgment and appealed to the Circuit Court, where the same motion was again overruled, and he appealed to the District Court. The latter court reversed the judgment, and the case is brought here upon error.

It is impossible to understand some of these preliminary proceedings. The record fails to throw any light upon their inducement or the circumstances surrounding them; but it is presumed that this is but a chapter of the same controversy considered in some of its aspects in *State v. Hixon*, and *State v. Bowen*, 41 Mo. 210-21. The questions we are called upon to decide are purely technical, and their decision must be governed by views long settled and universally acquiesced in. After the first canvass, and the election returns had been regularly and lawfully made, it seems there was an attempt to make a new one, and that the governor's commission was issued to the person declared to be elected on this second canvass. The notice required by the statute was made within twenty days of the second count of the votes, though more than twenty from the first; and we must first consider which was the official count referred to in the statute. Section 52 of the chapter of elections (*Wagn. Stat.* 573) provides that "no election of any county officer shall be contested unless legal notice of such contest be given in writing to the opposite party within twenty days after the votes shall be officially

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counted." The official count referred to is provided for by section 25 of the same chapter, which declares that "the clerk of each county shall, within eight days after the close of each election, take to his assistance two justices of the peace of his county, or two justices of the County Court, and examine and cast up the votes of each candidate, and give to those having the highest number of votes a certificate of election." It does not appear that the first count, had within the eight days after the election, was not in all respects regular and lawful, and the question then arises whether there could be any other count, and, if one were attempted, whether it had any force or validity. We have no hesitation in saying that it was altogether invalid. When this duty of the clerk was fully performed, it was performed once and forever, and could never be repeated. To suppose that it could be renewed—that the canvass of one day could be repeated the next, and counter certificates be issued to different contestants as new light or influence was brought to bear upon the mind of the clerk—would render the whole proceeding a farce. It is simply a plain ministerial duty of the clerk, aided by the two magistrates, requiring sufficient knowledge of arithmetic and moral honesty to count correctly, and clerical ability to make the certificate. When finished, the whole duty is performed, never to be repeated. That the clerk and justices might adjourn, if necessary, for one or more days before completing the count, need not be disputed; but after it is completed and certificates are issued the work is finished and the board is dissolved. The *People v. Supervisors of Greene*, 12 Barb. 217, was an application for a *mandamus* against defendants, as the board of canvassers, commanding them to reassemble and correct their estimate of the votes cast at a certain election, wherein the relator was candidate for county judge, by counting the votes of a rejected precinct. The court refused the peremptory writ upon the ground mainly that the board could not reassemble. Says the court: "That board met on the Tuesday following the election, and organized according to law. It then proceeded, though illegally and improperly, as is alleged, to estimate the votes of the county, and to make the statements prescribed by statute. \* \* \* The board has dis-

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solved. Were the same individuals again to convene, they would not again constitute the board of county canvassers. No statute authorizes such assembling, or prescribes its mode of organization. \* \* \* When the board deposited with the county clerk the result of its canvass, and declared who were elected to office, and published that result and determination, all its powers were expended."

But if the county clerk had the right to recount the votes at all, he certainly could not do so after the expiration of the eight days limited by the statute, and after the matter had been removed by notice of contest to the County Court. The second canvass was a nullity, and the certificate under it wholly unauthorized. The "official count," then, referred to in the requirement as to the time of notice, was the count made under the statute within eight days of the election.

It is admitted that the notice of the intended contest was given more than twenty days after this official count, and the question arises whether this requirement in regard to time is peremptory or may be enlarged. It has always been held that where the jurisdiction of a court is made to depend upon the time either of giving notice or of taking appeals, the requirement is peremptory. And in construing the statute under consideration, this court has ruled, in *Castello v. St. Louis Circuit Court*, 28 Mo. 278, that "the fifty-fifth section of the election law (same as § 52, Wagn. Stat.) provides that a legal notice in every contested election of a county officer must be given within twenty days after the official count. This is the longest period allowed for such notices. It may be requisite to give them before the lapse of twenty days, but they can not be deferred beyond that period in any case." *Wilson v. Lucas*, 43 Mo. 290, was a contest of an election to the office of circuit judge, the statute requiring forty days' notice. The petition was dismissed because that requirement had not been observed. This question is too well settled, both upon principle and authority, to admit of doubt, and the action of the County and Circuit Courts in refusing to dismiss the case for want of notice was clearly erroneous.

The contestant complains that inasmuch as the contestee took

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possession of the office more than twenty days after the official count, he is by this construction cut off from the right of appeal. It may be so, but not from his remedy. An information in the nature of a *quo warranto* in the Circuit Court, upon the relation of the contestant, would have brought up the whole matter. Such proceedings are not favored where a contest under the statute can be had, but in a case like the present it is the appropriate remedy. The governor's commission, though giving the holder a right to the office until judicially ousted, would be no bar to a full investigation of the rights of the parties.

The other judges concurring, the judgment of the District Court is affirmed.

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JOHN G. SELF, Respondent, v. ISHMAEL CORDELL, Appellant.

1. *Statute of frauds*—*Contracts not to be performed in one year, executed by one party, statute can not be invoked by the other.*—The purchaser of a carding machine, by a verbal agreement with the vendor, bound himself not to use any other carding machine in the vicinity of the one sold, for a period of four years. In suit by the vendor for breach of the contract, *held*, that although the contract could not be wholly performed within one year, yet having been completely executed by the plaintiff, defendant could not interpose the statute of frauds.

*Appeal from Fourth District Court.*

Triplett, for appellant.

H. C. Peirce, for respondent.

WAGNER, Judge, delivered the opinion of the court.

In this case no bill of exceptions is preserved in the record, and therefore there is nothing to review in this court except what may appear on the face of the record. The action was for damages for the violation of a contract, and alleged that the plaintiff purchased of the defendant a certain carding machine, and paid the purchase money, the defendant at the same time delivering the possession. As a part of the agreement, the defendant bound himself not to set up or superintend the running

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of any other carding machine in the vicinity of the one sold to the plaintiff, or near enough to be in competition with it, for the period of four years. A breach was alleged.

Defendant answered, denying the allegations of the petition, and set up, as a further defense, the statute of frauds, claiming that the contract was not to be performed within one year, and that, as it was not in writing, it was therefore invalid. There was a trial by the court and judgment for plaintiff. The only thing that can be noticed here is whether the contract was void under the statute.

It is true that the contract could not be wholly performed within one year; but it was entirely and completely executed by one of the contracting parties, and it is the established doctrine of this court, and the settled law of this State, that where an agreement not in writing has been wholly performed on one side, the other party thereto can not interpose the defense of the statute of frauds. (*Blanton v. Knox*, 3 Mo. 342; *Pitcher v. Wilson*, 5 Mo. 48; *Suggett's Adm'r v. Cason's Adm'r*, 26 Mo. 221.)

Judgment affirmed. The other judges concur.

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STATE *ex rel.* ATTORNEY-GENERAL, Plaintiff, *v.* JOHN WINDSOR,  
Defendant.

1. *County Court — Johnson county — Judges — Term of office — Allotment — Construction of statute.* — Under the act of March 19, 1866 (Sess. Acts 1865-6, p. 82, § 1), A. was, in 1866, elected one of two justices of the County Court of Johnson, and by allotment under section 3, chapter 137, Gen. Stat. 1865, his term of office was fixed at two years. But, *held*, that the provision of the section last named, in regard to allotment, applied only to County Courts composed of three persons, and that, under section 2 of the same chapter, his term of office continued for six years.

*Petition for quo warranto.*

*H. B. Johnson*, Attorney-General, for petitioner.

*H. W. Harmon*, for respondent.

CURRIER, Judge, delivered the opinion of the court.

This is an information in the nature of a writ of *quo warranto*. It is brought to test the right of the respondent, John Windsor, to the office of County Court justice for the county of Johnson. He was, as the information avers, duly elected to that office in 1866, and was subsequently commissioned by the governor, as such county justice, for a term of six years. It is now insisted by the relator that Windsor's term of office was for only two years, and that the commission for six years was consequently erroneously issued to him. This claim is based upon the theory that section 3, chapter 137, of the General Statutes of 1865, in relation to County Courts, governs the case, and that Windsor's term of office was fixed at two years by allotment, as therein provided.

There is undoubted confusion in the state of the statute law on this subject, and abundant grounds for rival constructions. It seems impracticable, however, to reconcile the various provisions of the statute with the theory insisted upon by the relator. The General Statutes of 1865, ch. 137, § 1, provide that "County Courts shall be composed of three members, to be styled the justices of the County Court," and that "each county, where the court is composed of three justices, may be laid off into districts," and that, in such case, one judge shall be elected from each district. This provision suggests the existence of counties where a different number of justices constitutes the courts. Section 2 of the same chapter provides that the justices of the County Court "shall hold their offices for six years;" and then section 3 provides that, at the regular election next succeeding the passage of the act, these justices shall be elected for each county, and that their terms of office shall be respectively two, four, and six years; the duration of the term to be determined by lot, in the manner pointed out in the section. The section then proceeds to state the reason of the allotment, namely: "so that thereafter there should be one justice of each County Court in this State elected every two years." These provisions clearly apply, and seem only to apply, to counties where the



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court is composed of three justices, styled the "justices of the County Court." After the first allotment, persons elected to that office hold for six years. In counties where there are but two of these justices, one could not be elected each two years and hold office for six. The biennial election necessitates three justices, or an abbreviation of the term. The provisions of the statute, thus far considered, are general in their application, and do not necessarily control the provisions of a special enactment, whether passed before or after a general law.

By a special act, passed March 19, 1866 (Sess. Acts 1865-6, p. 82, § 1), it is provided that the County Court of Johnson and twenty-seven other named counties should thereafter be "composed of two members, to be styled the justices of the County Court, and the judge of probate, who," it is provided, shall be "*ex-officio* president of the County Court." The act makes no provision for the election of these officers, or for their terms of office; but by another act, passed the same day (Sess. Acts 1865-6, p. 83), the election and term of office of the probate judge for each of the counties named in the prior act, is fully provided for, and the term fixed at four years.

It is difficult, if not impossible, to harmonize the provisions of the special act of March 19, 1866, limiting the number of members of the County Court in each of the named counties to two persons, who are "styled the justices of the County Court," with the provisions of section 3 of chapter 137 of the General Statutes of 1865, which contemplate a court composed of three persons, to be "styled the justices of the County Courts," and who are to be biennially elected, and hold their offices respectively for six years—that is, those elected after the first allotment.

By the second section of said chapter 137, the term of office of a county justice is fixed at six years. This is of general application, and must be accepted as defining the term of office of the county justices in Johnson and the other named counties, in the absence of some specific opposing rule applicable to the case; and the allotment rule laid down in the third section of chapter 137 is not deemed applicable.

If the judge of probate is regarded as one of the justices of

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the County Court, within the meaning of the act of March 19, 1866, still the rule would not work. His term of office is definitely fixed at four years, and the principle of biennial election of one justice is thus rendered of impossible application; for it would necessarily occur that, at one election, two justices would be elected at the same time; and then, the terms of two of the justices being six years, general elections would occur at which no county justice would be elected.

It is evident that the principle of biennial elections of one judge of each County Court, as embodied in section 3, chapter 137, of the General Statutes of 1865, can not be applied to the counties embraced in the act of March 19, 1866. The term of office of the justices of the County Courts in these counties, respectively, is fixed by section 2, chapter 137, General Statutes of 1865, and the provision of the third section of that chapter, in regard to allotments, is inapplicable.

The application for a judgment of ouster is therefore refused. The other judges concur.

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JOHN F. BURNAM, Respondent, *v.* MARVIN R. BANKS, Appellant.

1. *Deeds — Misdescription — Meaning of word "on."*—A deed described certain land as lying "on the Louisville & Nashville railroad," without giving the description of it by boundaries. In suit to set aside the conveyance as bad for misdescription, the proof showed that the land was near to, but not bordering upon, the road. *Held*, that the word "on," as denoting contiguity or neighborhood, may mean as well "near to," as "at;" and in this sense the land was not misdescribed.

*Error to Fourth District Court.*

*O. Guitar*, and *Moore*, for appellant.

*R. T. Prewitt*, for respondent.

BLISS, Judge, delivered the opinion of the court.

Plaintiff and defendant were both residents of Boone county, Mo., and entered into a written contract to exchange lands; that of the plaintiff being a farm in said Boone county, which he

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agreed to give for a place near Nashville, Tenn. Before the time for carrying the contract into effect he visited Tennessee, found the property, became dissatisfied with it and with the country, returned to Missouri, and commenced this proceeding to rescind the contract. He charges in his petition, first, a misdescription of the land, and second, fraudulent misrepresentations of its condition and value. Several issues were framed for submission to a jury, and a large number of instructions were presented, some of which were given and some refused. The verdict and judgment were for the plaintiff, and the District Court affirmed the action below.

It is wholly unnecessary to consider the instructions in detail, to decide which are correct and which erroneous; for the question upon which the case turned, and which colored nearly all the instructions, is one of construction. The contract described the Tennessee property as follows: "Twenty acres of ground more or less, lying in Davidson county, Tenn., on the line of the Louisville & Nashville railroad, seven to ten miles north of Nashville, on which is a two-story frame house, four rooms on ground-floor of main house and four above, now owned by Ann R. Banks, and on which H. Frank Banks now resides." The testimony shows the land to be within the angle of the turnpike roads, and that the house is about one-third of a mile from the railroad by a direct line, and half a mile by the usual road. The plaintiff claimed and the court held that the words "on the line" could not mean in the neighborhood of or near to the line of the road, but that they necessarily implied that the land was bounded by the road. The District Court, in giving the same construction, correctly holds that "the terms of a written instrument are to be understood in their plain, ordinary and popular sense, unless by known usage of trade they have acquired some peculiar meaning, or unless the context evidently points out that the parties intended they should be understood in some other and peculiar sense." (1 Greenl. Ev. § 278.) The question, then, is, what is the plain, ordinary and popular sense of these words? May they not mean near to as well as at the line? A friend goes to a distant State, and writes that he has purchased a farm and set-

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tled "on the line of" a certain railroad. Does he necessarily mean that his farm is bounded by the road? Emigrants follow our new roads as they are spanning the continent, and we say they are settling on the line of the road, which simply means at or near it. And in trading for land, or in answering inquiries in relation to the location of land in another State, if it was near a certain railroad it would be perfectly natural to say that it was on the line of the road.

Our best lexicons may be referred to as authority for the plain, ordinary and popular, as well as the technical sense in which words are used. "The line" of a road must mean, as used in the contract, the boundary of the land appropriated for its use, and the following is one of the definitions given by Webster to the preposition: "On. (5) At or near, indicating situation, place or position, as *on* the one hand; *on* the other hand; the fleet is *on* the American coast; the island is *on* the coast of England; *on* each side stands an armed man—that is, at or near each side; Philadelphia is situated *on* the Delaware." The following is one of the definitions of Worcester: "(3) Expressing the relation of nearness in place; contiguous to; near; at; 'Their navy, on your shores.'—*Dryden*. 'On each side.'—*Shak*. 'The town on the lake.'—*Lond. Encyc*." A lexicographer may be mistaken, and his definitions are only authority as indicating the popular use of the word defined. No one doubts the general accuracy of the two quoted, and they sustain our general understanding that the word "on," as denoting contiguity or neighborhood, may mean as well "near to" as "at," and in this sense there was no misdescription of the land by the phrase "on the line of the railroad." Light is often thrown upon the sense in which a term or phrase is used by the context. Had the contract contained a particular description of this land by boundaries, or even by terms implying exact location, then the phrase "on the line of the railroad" would naturally be held to make the road a boundary. But there was no such description in it, and in speaking of the general situation of this land in a distant State, without attempting a description of boundaries, or actual and precise position, and using words in their popular

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sense, it was natural for these parties to speak of it as on the line of the railroad. In holding, then, as matter of law, that that phrase necessarily meant next to or bounded by the railroad, the court committed an error which must invalidate its judgment.

The plaintiff alleges, in substance, that he relied entirely upon the representations of defendant in relation to the land, having never seen it himself, and not knowing its position, value, or condition, and charges that defendant falsely and fraudulently represented it as being bounded by the railroad; as being worth greatly more than its real value; that the buildings and fences were in much better repair than they were found to be; and that, in consequence of its actual location, value, and condition, it is worth much less to the plaintiff than it would have been had the defendant's representations been true. If these allegations and charges are true, the plaintiff is entitled to have his contract rescinded. They are facts to be found, either by the chancellor or by a jury, upon issues framed. Though put in issue by the pleadings, they do not seem to have been passed upon at the trial, the case having been decided upon the construction of the language of the contract.

The judgment of the District Court is reversed, and the case is remanded for further proceedings. The other judges concur.

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WILLIAM DUNCAN, Respondent, v. DAVID E. GIBSON, Appellant.

1. *Equity—Injunction to stay judgment—What diligence in defending original suit must be shown.*—A., who being personally and duly served with process, permits judgment to go against him by default, can not enjoin its execution on the ground that he was kept away from attendance at court by threats of bodily harm. Such allegation shows no use of reasonable diligence in his endeavors to defend. *Non constat* but he might have defended through counsel, without his personal attendance.

*Appeal from Third District Court.*

*J. S. Phelps and T. A. Sherwood, for appellant.*

*J. F. Hardin, for respondent.*

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CURRIER, Judge, delivered the opinion of the court.

This is a proceeding in equity to restrain a judgment at law. It appears from the record that Gibson, the present defendant, commenced a suit against Duncan, the present plaintiff, returnable to the Lawrence County Circuit Court at its May term, 1864. The suit was instituted in March of that year, and Duncan was personally and seasonably served with process. The petition in the case counted on a promissory note alleged to have been executed by Duncan, and which was alleged to have been lost or destroyed. Duncan did not appear to the action or make any defense, and judgment was in consequence taken against him by default.

On the 20th of October, 1865, the present proceedings were instituted to enjoin the judgment rendered in the former suit. As grounds for the injunction, it is alleged that the judgment was founded upon a note which had been fully paid, satisfied, and surrendered prior to the commencement of that action, and that the plaintiff therein was well aware of the fact at the time; that, notwithstanding the groundlessness of the suit, the defendant therein (the present plaintiff) was deterred from making any defense thereto, because of "threats of violence to his person; which threats (the petition alleges) were avowed and put forth by persons of dangerous conduct and vicious habits;" whereby, it is further alleged, the defendant (present plaintiff) "had good reason to fear, and did fear, that if he appeared at the May term of the Lawrence Circuit Court, the time when said summons was returnable, his life would be taken." The petition is voluminous, but the foregoing exhibits the substance of its material parts. The defendant demurred to the petition, and thus raises the question whether the plaintiff has shown, by his allegations, a sufficient excuse for not making in the former suit such defense as he might have had thereto while the same was pending. The Circuit Court granted the injunction, and the District Court affirmed its judgment. The defendant brings the case here by appeal.

It is a well established principle that, in cases of this class, the complainant must not only show that he had a good defense to,



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the suit, in which the judgment sought to be enjoined was rendered, but also that he had used all reasonable diligence in his endeavors to make such defense available in that suit. If the failure of the defense resulted from the defendant's own negligence, inefficiency, and want of care, he is thereby shut out from the remedy by injunction. It has repeatedly been so held by this court, and there is no occasion for a further discussion of the subject at this time. (George v. Tutt, 36 Mo. 141; Reed's Adm'r v. Hansard, 37 Mo. 199; March's Adm'r v. Bast, 41 Mo. 493.)

An application of the principle above announced, to the facts disclosed in the plaintiff's petition, is fatal to the case. He shows no diligence, or that he made any effort whatever to defend against the suit at law. He does not appear to have even taken the trouble to consult counsel on the subject. His fear of harm, in case he made his personal appearance at the Lawrence Circuit Court, furnishes no excuse for his neglect to employ an agent to look after his interests. The alleged threats, instead of furnishing an excuse for his remissness in this respect, exhibit his negligence in a more remarkable light. There is nothing to show that his personal attendance at court was in any way necessary to the transaction of whatever might be required to be done at the return term of the writ, or that an attorney could not, in the absence of Duncan, have done all that was necessary. But the plaintiff employed no agent or attorney, nor did anything looking to a defense of the suit, so far as appears. He was personally served with process, and thus apprised of the claim being made upon him, but seems, nevertheless, to have treated the process of the court with entire indifference, permitting judgment to go against him by default. He must abide the consequences of his remissness and folly. The case of George v. Tutt, above cited, presents quite as strong grounds for an injunction as appear in the case at bar.

With the concurrence of the other judges, the judgment will be reversed and the petition dismissed.

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State ex rel. Owens, petitioner, v. Draper, State Auditor.

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STATE *ex rel.* JAS. W. OWENS, Petitioner,<sup>1</sup> v. DAN. M. DRAPER,  
State Auditor, Respondent.

1. *Mandamus—Election of judge to Legislature—Pay of a judge while member of Legislature.*—Under section 11, article 4, Constitution of Missouri, where one holding the office of judge of a Circuit Court qualified and took his seat in the Legislature, he elected to vacate the office of judge, and would not be entitled to his salary as judge afterwards. He should, however, receive pay after the time of his election in the Legislature till he qualified as member.

*Petition for mandamus.*

*King Brothers*, for petitioner.

*H. B. Johnson*, Attorney-General, for respondent.

I. The two offices of circuit judge and State representative are made incompatible by our constitution. (Const., art. 4, § 11.)

II. These offices would be incompatible at common law. (Bryan v. Cattell, 15 Iowa, 550; Milward v. Thatcher, 2 T. R. 81; 17 Howell's State Trials, 846, note; Rex v. Tizzard, 9 B. & C. 418; Rex v. Geyer, 1 Burr. 245; Rex v. Lawrence, 2 Chit. 271; Rex v. Sir Wm. Trelawney, 3 Burr. 1615; Rex v. Pateman, 2 T. R. 777; Rex v. Bond, 6 D. & R. 333; Rex v. Patterson, 4 B. & Ad. 23.)

III. Where a person accepts an office incompatible with another office already held by him, the office previously held thereby becomes vacant. (Milward v. Thatcher, 2 T. R. 81; Rex v. Sir Wm. Trelawney, 3 Burr. 1615; 1 Kyd on Corp., ch. 3, § 3; 17 Howell's State Trials, 846, note; Rex v. Tezzard, 9 B. & C. 418; Rex v. Pateman, 2 T. R. 777; Rex v. Bond, 6 D. & R. 333; Rex v. Lawrence, 2 Chit. 371; Rex v. Geyer, 1 Burr. 245; Rex v. Patterson, 4 B. & Ad. 23; Cole on Crim. Jur. 54, Law Lib. 116; Stamland v. Hopkins, 9 M. & W. 178; People v. Provinces, 34 Cal. 520; Bryan v. Cattell, 15 Iowa, 550.)

WAGNER, Judge, delivered the opinion of the court.

The relator, who was formerly judge of the ninth judicial circuit, asks this court to issue a peremptory writ of *mandamus*

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State ex rel. Owens, petitioner, v. Draper, State Auditor.

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against the respondent, who is State auditor, to compel him to audit his account for salary as judge, from the first day of January, 1868, to the 31st day of March in the same year. The auditor, in his answer, assigns as a reason for his refusal to audit the said account, that on the first day of January, 1868, the said Owens resigned the office of judge of the ninth judicial circuit, and did not hold or execute the duties of the office thereafter. And for a further answer he says that from the first day of January, 1868, to the 31st day of March, 1868, Owens held and exercised the office of representative in the house of representatives in the Missouri State Legislature, and that he has heretofore received a warrant for his services as such representative, which warrant has been duly paid by the State treasurer; and that the relator is not entitled to receive from the State payment for services in two capacities for the same time.

To this return there is a replication filed, in which it is denied that the relator resigned the office of judge of the Circuit Court, and it is also denied that he was a member of the Legislature from the first day of January, 1868, as stated in the return. But it is admitted that he was a representative in the lower house of the General Assembly from and after the 15th day of January thereafter.

The case is submitted on the pleadings, and they show that whilst Owens was a judge of the Circuit Court he was elected a representative to the Legislature, qualified, took his seat, and performed the duties and functions of that office. There does not appear to have been any resignation of the judgeship, and the question is whether he could legally hold the two offices and receive the pay appertaining to both at the same time. There has never been any doubt about the principle, so far as I am advised, that at common law, if a party accepts another office which is incompatible with the one he holds, the first one would become vacant.

Suppose Owens, instead of being elected to the Legislature, had been elected to a seat on this bench, and had qualified and entered on the discharge of its duties. It is perfectly clear to my mind that his seat on the circuit bench would have been

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thereby vacated. Or if the auditor should be elected treasurer, or the attorney-general secretary of State, their acceptance of the latter offices would necessarily vacate their former ones. Besides the common-law rule, the State government is divided into separate and distinct branches or departments, the officers of each having separate and independent functions to perform. It was designed that they should be distinguished and divided by a line of demarkation, and that one should not trench upon the other. This principle was deemed of such importance that it was made the subject of an express constitutional provision. In the constitution it is declared that "no member of Congress, or person holding any lucrative office under the United States or this State (militia officers, justices of the peace and notaries public excepted), shall be eligible to either house of the General Assembly, or shall remain a member thereof, after having accepted any such office, or a seat in either house of Congress." (Const. of Mo., art. 4, § 11.)

Under this provision a judge of a court of record is clearly ineligible to a seat in either house of the Legislature whilst he holds the office of judge. The existence of the two offices in the same individual is incompatible, and is peremptorily prohibited.

By the phrase "shall not be eligible," I do not think it was intended to prohibit a person who occupied the position of judge from running for or being elected to the Legislature. But if he should run and be elected, he would have to make his choice of which office he would retain, and his acceptance of one would necessarily operate as a vacation of the other. Therefore it follows that when Owens qualified and took his seat in the Legislature he elected to vacate and abandon the office of circuit judge.

It is contended that the relator is at least entitled to pay up to the 15th day of January, the time at which he took his seat in the house of representatives, and this, I think, is correct. Although previously elected, he did not qualify and actually become a member till that time. Up to that date he was circuit judge, and held no other office. He is, therefore, entitled to draw his salary as circuit judge for the period of two weeks, com-

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mencing on the 1st day of January, 1868; but as the petition asks for the full salary of an entire quarter, it can not be allowed.

Writ denied. The other judges concur.

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ALFRED STEPHENSON *et al.*, Defendants in Error, *v.* WILLIAM H. PORTER, Plaintiff in Error.

1. *Courts, justices*—*Items of account must show the amount sued for.*—In an action before a justice of the peace, the account sued on and the specific items claimed, and not the amount named in the prayer for judgment, must be taken as showing the "debt or balance" sued for.
2. *Agent — Testimony of, binding on principal, when—Practice, civil—Actions ex contractu.*—In a suit against a sheriff for pasturage of certain cattle seized under execution, a promise to pay the amount claimed, by one who acted as his deputy in the transaction of the business, is binding on the sheriff. In such case, if the cattle remained in the plaintiff's pasture by his permission, he would be entitled to a reasonable compensation, even though they were originally placed there against his consent. Plaintiff, on such a state of facts, could properly recover in an action *ex contractu*.

*Error to First District Court.*

J. F. Phillips, for plaintiff in error.

Wright & Cochran, for defendants in error.

CURRIER, Judge, delivered the opinion of the court.

This suit was instituted before a justice of the peace to recover a sum claimed to be due from the defendant to the plaintiffs. Judgment was recovered by the plaintiffs, and the defendant appealed to the Circuit Court, where, on a trial *de novo*, the plaintiff again succeeded, and recovered a judgment for \$46.72. On appeal by the defendant to the District Court, the judgment was affirmed, and the defendant now brings the case here by writ of error.

It is objected that the demand in suit exceeds the jurisdiction of a justice; that improper evidence to the prejudice of the defendant was admitted; that the evidence does not support the action; and that the court erred in declaring the law of the case.

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Stephenson et al. v. Porter.

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1. The account forming the basis of the plaintiffs' claim, and the justice's transcript of his docket, show that the suit was brought to recover the sum of \$80.80. The written statement of the case, filed with the justice in connection with the account, also shows that the claim, which consisted of two items—one for \$44.80 and one for \$36—was for \$80.80; but the prayer for judgment is for \$90.80. The transcript, the account, and the specific items claimed in the written statement must be taken as showing the "debt or balance" sued for. (Gen. Stat. 1865, ch. 177, § 2.) The amount stated in the prayer for judgment is an evident erroneous footing of the items of the claim sued on.

2. The case shows that the defendant was, in 1861, the sheriff of Pettis county, and that Samuel O. Yankee was his deputy. Yankee, in November of that year, as such deputy, levied an execution on a large number of cattle, the property of the execution debtor, and left them in the plaintiffs' pasture, where they had just been driven for the purpose, as the evidence tended to show, of being separated from cattle owned by the plaintiffs and another party. The plaintiff, Stephenson, testified that he notified Yankee at the time that the pasture belonged to him and his associate, and that they would "hold him responsible;" that he met Yankee a day or two after and told him that unless the animals were removed, or an arrangement was made, he would turn them into the common; that Yankee stated in reply that the animals would be released in a few days; to let them remain, and that he (Stephenson) would be paid for it. He further testified, among other things, that the cattle remained in the pasture for a week or so, and were then taken away, whereupon he presented his bill to the defendant, who, as the witness testified, promised to pay it in the course of two or three weeks.

The statements made on the second interview between Stephenson and Yankee are objected to as irrelevant and incompetent. The objection is untenable. Yankee made the levy, and had charge of the business as the defendant's representative. What passed between him and Stephenson stands on the same footing as though the conference had occurred between Stephenson and Yankee's principal. Porter's presence at the original levy does



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not modify the case. Yankee transacted the business as Porter's deputy.

3. At the conclusion of the testimony, the court gave for the plaintiffs two declarations of law, to the effect that if the jury found that the defendant levied on the animals and placed them in the plaintiffs' pasture, and they remained there with the plaintiffs' assent, the plaintiffs would be entitled to the reasonable value of the pasturage, although the jury might be satisfied that the animals were originally left in the pasture against the plaintiffs' consent. The instructions are inartificially drawn, but are, in substance, correct, and could not have misled the jury to the defendant's prejudice.

4. The defendant asked the court to instruct that "from the evidence in the case, the plaintiffs were not entitled to recover under this form of action."

Forms of action in justices' courts, in civil causes, are of but little moment. It is substance, and not form, that is important. The plaintiffs sued in form *ex contractu*. It seems to be the theory of the defendant's counsel that the evidence only warrants a recovery in an action *ex delicto*. The suit was well brought, and the evidence was sufficient to submit the case to the jury on such instructions as were given.

The whole substance of the case is this: the plaintiffs objected to the animals remaining in their pasture after they were levied upon — made no contract then, express or implied; but subsequently, and in a day or two, at the instance of the defendant's deputy, who had the business in charge, allowed the animals to remain as was desired, and in due time presented a bill for payment, which, as there was evidence tending to show, the defendant recognized and promised to pay, but never did.

Let the judgment be affirmed. The other judges concur.

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 Snoddy et al. v. County of Pettis.
 

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**S. F. SNODDY et al., Defendants in Error, v. COUNTY OF PETTIS,**  
**Plaintiff in Error.**

1. *Courts, County—Appellate jurisdiction—Certiorari, etc.*—When appeals from the judgments or orders of County Courts are not expressly provided for by statute, resort must be had to writs of *certiorari*, etc., to obtain appellate jurisdiction.
2. *Courts, County—Appeals—Orders—Final judgment necessary to secure appeal.*—On an appeal from the order of a County Court to a Circuit Court, there should be a judgment of affirmance or reversal thereon, to entitle parties to further appeal.
3. *County roads, petition for—Signatures of householders, proof concerning—Joint assessments.*—A petition for a new county road need not show on its face that twelve of its signers were householders, although this fact must be proved to the satisfaction of the court before any action can be taken upon the petition. But although this character of the signers does not appear in the records of the court, an order of court establishing the road will raise the presumption that it was proved, unless the contrary appears; and where the damages were assessed in favor of the petitioners, jointly, they will be presumed to have owned the land taken jointly, and not severally.
4. *County roads—Orders for opening, under section 52, p. 1228, Wagn. Stat.—Defects in.*—An order for opening a county road, under section 52 of the act touching roads (Wagn. Stat. 1228), wherein it was adjudged "that the petitioners for said road pay the assessed damages and costs, and that the road be opened," was defective in not specifying the width of the road, in attempting to render judgment for damages against the petitioners, and in making an order for opening the road before the petitioners had paid "the amount of such damages into the county treasury."

*Error to First District Court.*

*Philips & Vest*, for plaintiff in error.

The verdict of a jury in the matter of opening roads is final and conclusive as to the matter of damages. No appeal lies therefrom. (*Emory S. Foster et al. v. Dunklin*, 44 Mo. 216.) The jurisdiction of the Circuit Court in such cases is confined solely to an examination of the record, and can reverse only for error apparent thereon. The Legislature have made no provision for an appeal in such case as the one at bar. (*Vide* Gen. Stat. 1865, ch. 136, § 2.) The Legislature have expressly provided for a writ of error, applicable to all the necessities of the case at bar. (Gen. Stat. 1865, ch. 135, § 10.) The judgment of the District Court must be reversed, because the record shows no final judgment of the Circuit Court.

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Snoddy et al. v. County of Pettis.

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*Lay & Belch*, for defendants in error.

I. In the case at bar, the statute gives the right of appeal. (Gen. Stat. 1865, ch. 136, § 2. *Vide* also 19 Mo. 257.)

II. Under section 49, Sess. Acts 1868, p. 149, the petition must specify the course and *termini*, with not less than two intermediate points on the road, and its direction. It must be signed by at least twelve resident householders of the township or townships through which the road is desired, and three of the twelve shall reside in the immediate neighborhood. These requisites do not appear.

III. The commissioner had no authority to adjudge the petitioners equally interested in the lands.

IV. The court erred in not finding, and entering of record such finding or judgment, that the County Court deemed the road "of sufficient utility." This is essential, not only because it is required by the law (§ 52), but the validity of the law itself rests upon the doctrine of public use or necessity.

V. The court erred in ordering the road to be opened upon the mere statement that the petitioners would pay the damages. (Wagn. Stat. 1228, § 52.)

BLISS, Judge, delivered the opinion of the court.

W. H. Powell and others petitioned the Pettis County Court for a new road, against which Snoddy and others remonstrated, and appealed to the Circuit Court from the order of the County Court establishing the road. Many questions are raised by the record, and the first pertains to the right of such appeal. The Circuit Court has "appellate jurisdiction from the judgments and orders of the County Courts in all cases not expressly prohibited by law." But it does not follow that matters may be taken up in the ordinary form of appeal. When such appeal and the manner of taking it are not expressly provided for by statute, this appellate jurisdiction can not be exercised in that manner, but resort must be had to writs of *certiorari*, etc.; and in this case, had the point been raised in the Circuit Court, it would have been manifest error had the appeal not been dismissed.

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We perhaps should consider no other question, and vacate all proceedings since the appeal, for that reason. But, in deference to the action of this court in *Cooper County v. Geyer*, 19 Mo. 257, we will treat the record as though regularly brought up, inasmuch as this question was not raised below.

There is a defect in the proceedings of the Circuit Court, that, had the cause originated there, would of itself require us to send it back. There seems to be no final judgment. A motion was made by the appellants to revise the order of the County Court, setting forth the reasons in detail, which motion was overruled, and no other action was had. This is an unusual mode of assigning errors. But, whether correct or not, there should have been a judgment of affirmance or reversal. Upon error to the District Court, this action was treated as a judgment of affirmance, and was reversed for alleged errors in the proceedings of the County Court.

It is claimed that those proceedings were erroneous: First, because the petition does not show that twelve of its signers were householders of the township, etc. The statute is express that it must be signed by that number of householders, etc., three of whom shall be of the immediate neighborhood of the road. But it does not say that they shall be so described in the petition; and if they were so described, it would have been no evidence of the fact. This character of the petitioners must be proved to the satisfaction of the court before any action is taken upon their petition; and it would be well, though it is not essential, for the record to show the finding of the court in this regard. But if the County Court makes an order in relation to the subject-matter of the petition, which it would have no right to make without preliminary proof, we are bound to suppose, unless the contrary appears, that this proof was made. Second, the road commissioner assessed the damages to the three persons who have brought the case up, jointly, when neither the report nor any part of the record shows whether the land or lands, for the occupation of which the damage was assessed, belonged a part to each, or to all jointly, and, if jointly, the proportion of each. A jury trial was had, and the assessment was increased, but still it was

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a joint one. No objection was made in the County Court to this form of assessment; but, upon appeal, it was claimed to have been erroneous, and was given, in the opinion of the majority of the district judges, as the principal ground of their decision. It seems to us that we are bound to presume, in this regard, as well as concerning the character of the petitioners, that the action of the court was legal, unless the contrary appears. If the plaintiffs owned the tract of land, over which the road was laid, in common and in equal proportions, the joint assessment was correct, and we can not assume, without evidence, for the sake of finding errors, that they owned it severally.

The third objection to the proceedings is that the order opening the road does not say in terms that the court deemed it "of sufficient utility to justify," etc. This objection should be taken in connection with the fourth, which goes to the substance of the judgment. After reciting the impaneling of the jury and verdict, it concludes as follows: "It is therefore adjudged by the court that the petitioners for said road pay the assessed damages and costs, and that the road be opened." The grave deficiency of this judgment will appear by reference to section 52 of the road act (Wagn. Stat. 1228), which provides that "whenever the County Court shall deem a new county road of sufficient utility to justify the opening of the same, and said County Court is unwilling to pay the damages assessed therefor out of the county treasury, and the petitioners for such road shall first pay the amount of such damage into the county treasury, the court shall then order such road to be opened as herein provided."

The general power to open roads, with or without a petition, is given by section 2 of the act; and that just recited pertains more especially to roads opened at the expense of the petitioners, and under it the court evidently supposed it was acting. The order is defective in not specifying the width of the road, which should be done in all cases. It is also defective in attempting to render judgment against the petitioners for damages, which the court is not authorized to do; and, while looking to them to pay such damages, evidently being unwilling to pay them out of the county treasury, it is defective in making an order for opening the road

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 McClurg et al. v. Howard.
 

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before the petitioners had paid "the amount of such damages into the county treasury." The order opens it at the expense of the county, or it does not open it at all; for if the court looks to the petitioners for this expense, it has no right to make the order until its amount is so deposited.

This order of the County Court, being a final one, and so clearly defective, should have been reversed by the Circuit Court, had it been properly brought within its jurisdiction; and there having been no proper judgment, either of affirmance or reversal, in that court, the judgment of the District Court found nothing upon which to operate.

The proceedings, therefore, of both courts are set aside, together with the final order of the County Court, and the matter is remanded to the last-mentioned court for further proceedings. The other judges concur.

McCLURG, MURPHY, *et al.*, Appellants, *v.* F. C. HOWARD,  
Respondent.

1. *Partnership—Part payment by one partner—Statute of limitations.—*

Part payment of a firm-debt by one partner, after dissolution, within five years before suit brought, will take the debt out of the operation of the statute of limitations as to the other partner; but *semble*, that the rule would not apply in case of part payment made after the statute had run and the debt had been barred.

*Appeal from Third District Court.*

*Sherwood, and Johnson & Budd*, for appellants.

I. A partial payment by one joint obligor or partner, after dissolution of the partnership, will take a debt, not yet barred, out of the statute of limitations as to all. (*Whitcomb v. Whitney*, 2 Doug. 652; *Wood v. Braddick*, 1 Taunt. 104; *Jackson v. Fairbank*, 2 H. Bl. 340; *Goddard v. Ingram*, 3 Ad. & El. 839; *Smith v. Ludlow*, 6 Johns. 267; *Roosevelt v. Marks*, 6 Johns. Ch. 266; *Shelton v. Cook*, 3 Munf. 191; *Simpson v. Morrison*, 2 Bay, 533; *Kauffman v. Fisher*, 3 Grant, 302; *Carroll v. Gayarre*, 15 La. An. 671; *Hunt v. Bridgham*, 2 Pick. 581; *Sigourney v.*



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Drury, 14 Pick. 387; Fisher v. Tucker, 1 McCord's Ch. 190; Patterson v. Choate, 7 Wend. 441; Pike v. Warren, 14 Maine, 390; Dinsmore v. Dinsmore, 21 Maine, 433; Shepley v. Waterhouse, 22 Maine, 497; White v. Hale, 3 Pick. 291; Getchell v. Heald, 7 Greene, 26; Bound v. Lathrop, 4 Conn. 336; Coit v. Tracy, 8 Conn. 268; Austin v. Bostwick, 9 Conn. 496; Craig v. Callaway County Court, 12 Mo. 94; Lawrence County v. Dunkle, 35 Mo. 395; Smith's Adm'r v. Irwin, 37 Mo. 169; Burr v. Williams, 20 Ark. 171; Hicks v. Lusk, 19 Ark. 692; Tillinghast v. Norse, 14 Ga. 641; Cox v. Bailey, 9 Ga. 467; Colburn v. Averill, 30 Maine, 425; Tanner v. Ross, 1 R. I. 88; Whitaker v. Rice, 9 Minn. 13; Corlies v. Fleming, 1 Vroom, 349; Patch v. King, 29 Maine, 448; Zent v. Hart, 8 Barr. 337; Davis v. Coleman, 7 Ired. 424.)

II. In this case, the partial payment being made before the bar attached, and while each partner was liable and authorized to pay for all, it merely continued their liability, and did not create a new obligation. Hence, the statute would only begin to run from the time of such partial payment. (Craig v. Callaway County Court, 12 Mo. 94; Collyer on Part., § 430, and notes; Story on Part., § 324, and notes; Carr's Adm'r v. Hurlburt's Adm'r, 41 Mo. 264; Isley v. Dewett, 3 Metc. 439.)

*Baker & Ellis*, for respondent

A partner, after dissolution, can not, by any act of his alone, bind his former co-partners so as to create any new liability against them, or extend or increase their responsibility. (3 Pars. on Cont. 79, § 4, and note; 1 Kernan, 176; 7 Yerger, 534.) The case of Lawrence County v. Kinkle, 35 Mo. 395, is not applicable to this case. The dissenting opinion of McBride, J., in Callaway County Court v. Craig, 12 Mo. 94, contains the true modern doctrine; and see 37 Mo. 169.

BLISS, Judge, delivered the opinion of the court.

The plaintiffs brought suit in the Christian Circuit Court against the members of the firm of Nowlin, Howard & Co., for goods and merchandise sold them in the usual course of trade, which suit Howard alone defended, and pleaded the statute of limita-

tions. He claims that he went out of the firm in 1857 (of which plaintiffs had notice), which was more than five years before the commencement of the suit. The plaintiffs, to take the case out of the statute, relied upon the fact that the sums of \$500 and \$30 were, in 1861, paid upon the debt by this defendant's co-partners; but the Circuit and District Courts held that it did not have that effect, and judgment for defendant was rendered and affirmed.

Few questions have been more zealously contested in the common-law courts than the one involved in this record. The case of *Whitcomb v. Whiting*, 2 Doug. 652, decided by Lord Mansfield in 1781, was for many years treated as establishing the doctrine that one of the makers of a promissory note, by the payment of the interest and part of the principal within six years (the limitation fixed by 21 Jas. I, ch. 16), took the case out of the statute as to the other makers as well. This case was for a time generally followed by the courts of the United States, and is still considered the law of England, and has been applied to all partnership debts, as well as to joint makers of a bill or note; and no distinction seems to have been made between a part payment before the statute had run, and one made after the expiration of the time limited. The whole subject is learnedly discussed in the notes to the fifth edition of Angell on Limitations, pp. 273-9; also in a note to section 324, Story on Partnership.

The general effect of a new promise or acknowledgment, which had been the subject of such conflict of opinion, has been set at rest in Missouri by the adoption of the substance of the statute of 9 Edw. IV, ch. 14, so far as it pertains to this subject, which is embodied in sections 28, 29, and 30, pp. 920-21, of Wagner's Statutes, by which all such new promises and acknowledgments must be in writing. But the express exception made by section 30, that the statute shall not take away or lessen the effect of a part payment, leaves cases like the one at bar precisely as though it had not been adopted. The effect of such payments has been very elaborately considered in the Court of Appeals of New York, in *Van Kenren v. Parmelee*, 2 Comst. 523, and in *Shoemaker v. Benedict*, 1 Kernan, 176. In the former case the part payment was made after the statute had run and the defendant had been

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discharged by its operation. The decision could only have been that, under such circumstances, a co-obligor had no power, as against the others, to revive an obligation already discharged; although the reasoning of Judge Bronson, in delivering the opinion, goes much further, and would apply as well to a case like the present as to the one before him. But in *Shoemaker v. Benedict*, the court expressly held that a part payment by a joint obligor, made before the statute had run, had no effect to prevent its running against his co-obligors. I confess it would be very difficult to reply to or resist the force of the reasoning of Judge Allen, who gave the opinion of a majority of the court in that case; and were the question a new one in Missouri, I would favor the application of its doctrine to the present case. But the question was expressly decided the other way by this court in *Craig v. Callaway*, 12 Mo. 94, and the decision was in accordance with the authorities at that time. The business and credits of our people have ever since been conformed to that view, and if a change is deemed expedient, it should be made by the Legislature in reference to future indebtedness. We are referred by counsel to *Smith's Adm'r v. Irwin*, 37 Mo. 169, but that case is entirely consistent with *Craig v. Callaway*, and only holds that an administrator can not, after the statute has run, bind the co-obligor of his intestate; and the court would doubtless have held, had it been necessary, that the intestate, if living, would not have had that power.

Regarding this question as not an open one in Missouri, we must hold that the Circuit Court erred in deciding that the payment of part of the debt by one partner could not extend the operation of the statute as to the others. The record in this case, sent up from the Circuit Court, is very badly got up and more than twice as long as was necessary or proper. It is full of repetitions — copying papers two or three times, for no apparent reason than to make costs. This practice should not be permitted.

The judgment is reversed and the cause remanded for further proceedings, with directions to the Circuit Court to tax one-third of the cost of transcript of the original record to the circuit clerk, and one-third to the plaintiffs, whose attorneys should have prepared a better bill of exceptions. The other judges concur.

CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,  
FEBRUARY TERM, 1870, AT ST. JOSEPH.

ALEXANDER PETERSON *et al.*, Respondents, v. WM. T. WHEELER,  
Appellant.

1. *Bills and notes — Part payment — Promise to pay remainder — Accord and satisfaction.*—Part payment on a note coupled with a promise to pay the remainder on request, where the note itself was neither paid, canceled or surrendered, and no agreement was entered into on the one side either to surrender or release it, and no offer was made, on the other, to pay the balance due, amounted merely to an executory accord, and constituted no bar to suit on the note for the balance; nor would the fact that the transaction was in writing vary the result.

*Appeal from Sixth District Court.*

*Hereford & Foote*, for appellant.

*L. E. Carter*, for respondents.

I. Any collateral agreement between the parties to the suit, which is not executed, is no defense to the notes sued on, and an acceptance of the performance of such agreement by plaintiff is necessary to its existence. (3 Blackst. 15, and notes; 2 Pars. on Cont. 681; Chitty on Cont. 760; 2 Starkie on Ev. 15; 2 T. 24—VOL. XLV.

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R. 24; Edw. on Bills, 579; 23 Wend. 343; 19 Wend. 408-516; 6 Wend. 390; 16 Johns. 86; 5 Johns. 386.)

II. There was no release nor good accord and satisfaction set up in defendant's answer. (5 East. 230; 26 Maine, 88; Edw. on Bills, 538; Story on Prom. Notes, 404-26; 23 Pick. 473; 3 Blackst. 15, and notes; 2 Pars. on Cont. 681; Chitty on Cont. 76; 2 Starkie on Ev. 15.)

CURRIER, Judge, delivered the opinion of the court.

The plaintiffs sue on five promissory notes aggregating \$285, exclusive of interest. The defendant alleges substantially, in the way of defense, that he accounted with the plaintiffs concerning these notes and the payments thereon, and that, upon such accounting, it was found that he owed them \$250; that he thereupon paid \$50, and promised to pay the balance on request; that such accounting was in full satisfaction of said notes, and that it was so accepted at the time by the plaintiffs. The fifty dollar payment and a promise to trade with the plaintiffs for the three next ensuing years are alleged as inducements to the settlement, and it is also alleged that the accounting was reduced to writing and signed by the plaintiffs. These facts do not constitute a bar to the action. The notes are not alleged to have been either paid, canceled, or surrendered; nor is it averred that there was any agreement for their surrender or release, or that the defendant has either paid or offered to pay the acknowledged balance against him. The answer seems to have been framed upon the theory of an accord and satisfaction; but the facts alleged merely show an accord without satisfaction, and without even a tender of satisfaction. The allegations on this point go no further than to assert a readiness to pay the agreed balance on demand. The transaction set out in the answer, at most, amounts to an executory accord, and that constitutes no bar to a suit brought to recover the original indebtedness. (See *Brooklyn Bank v. De Graw*, 23 Wend. 341, and the authorities cited in the opinion of the court.) The circumstance that the "accounting" was in writing does not vary the result. The statute of frauds is not in question. The defendant's counsel have endeav-

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ored to put the case on the ground that the facts alleged constituted a release of the original indebtedness, and cited some authorities; but the authorities cited give no support to that view of the subject.

At the trial the sufficiency of the answer was drawn in question by the instructions and by objections to the defendant's evidence, which instructions and objections are based upon the theory that the facts stated in the answer do not constitute a bar to the suit. Instructions were given and refused, and objections to evidence overruled, upon an opposite theory, and therein the court, in my opinion, committed error.

The other judges concurring, the judgment will be reversed and the cause remanded.

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GEORGE M. TAYLOR, Appellant, v. SQUIRE HOLMAN, Respondent.

1. *Practice, civil—Damages—Willful negligence, allegation of—Instructions.*  
—In a suit for damages by reason of injuries done to a mill, which were alleged to have resulted from defendant's willful negligence, the allegation of "willful" negligence in the pleading was wholly immaterial, and might have been stricken out as surplusage; and an instruction that required, as a condition to plaintiff's recovering, that the jury should find the actions or omissions complained of to have been in any sense "willful," was misleading, and proper ground for reversing the cause on appeal.

*Appeal from Fourth District Court.*

*Williams & Eberman, and G. M. Taylor, for appellant.*

If the evidence shows the defendant guilty of breaking plaintiff's mill by carelessness or negligence, it need not show, in order to establish plaintiff's right of recovery, that such breaking was willful.

*Dysart & Brown, for respondent.*

CURRIER, Judge, delivered the opinion of the court.

The plaintiff mingles in his petition, and in the same count, different and incongruous causes of action: one for rent accrued



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upon a parol lease of a mill; and one for injuries to the mill, alleged to have resulted from the defendant's willful negligence. No objection, however, was taken to the petition, and the matter is therefore not open for consideration here.

The plaintiff having been defeated in the action, brings the cause here by successive appeals. The only point requiring attention relates to the defendant's second instruction, which directed the jury that, unless they believed that the plaintiff's mill was injured by the "willful negligence" of the defendant, or some one in his employment, they should find for the defendant, as respected that branch of the case. This instruction was clearly erroneous, and may have seriously misled the jury. It was quite capable of being used in argument greatly to the plaintiff's prejudice, and can not be defended. Nor is the error in the instruction cured by the form of the allegation of negligence in the petition, or by the instructions given for plaintiff. The allegation of "willful" negligence in the pleading was wholly immaterial, and might have been struck out as surplusage. (*Parton v. Holland*, 17 Johns. 92.) It was sufficient for the plaintiff to show that the injury complained of resulted from the defendant's negligence, however unintentionally that negligence may have induced the alleged injury, or however unintentional the negligence itself may have been. The issue was one of simple negligence. The instruction, therefore, that required, as a condition to the plaintiff's recovery, that the jury should find that the acts or omissions complained of were in any sense willful, was wrong and misleading; and for that reason the judgment must be reversed and the cause remanded. The other judges concur.

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WM. H. ELLIOTT, Appellant, v. F. S. BLACK *et al.*, Respondents.

1. *Replevin — Justice's court — Frame building — Jurisdiction.* — An action in replevin before a justice of the peace for the recovery of a "frame building" is not bad on its face for want of jurisdiction. Whether the building was attached to the realty and constituted a part of it, so as to be the subject of an action in ejectment, or was a mere personal chattel, was a point to be settled by the evidence.

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2. *Replevin—Dismissal—Suit on return bond—Damages—Justice's court.—*

When the complainant in a replevin suit fails to prosecute the same to a successful issue, that failure constitutes a breach of the condition of his return bond, and warrants a suit upon it, although there may have been no judgment in the replevin suit either for damages or a return of the property; and this is true whether the suit originated before a justice or the Circuit Court.

*Appeal from Fourth District Court.*

*Burgess & Mullins*, for appellant.

I. The court having failed to assess the damages when the suit in replevin was dismissed, or to render judgment for the return of the property, the defendant in that action and the plaintiff in this was entitled to judgment on the bond for all damages sustained. (*Berghoff v. Heckwolf*, 26 Mo. 511; *Reed v. Wilson*, 13 Mo. 28; *Smith v. Winston*, 10 Mo. 299.)

II. There is nothing on the face of the petition which shows that the justice did not have jurisdiction of the cause. It was a question of proof as to whether the frame building was real or personal property.

*G. W. Easley*, for respondent

CURRIER, Judge, delivered the opinion of the court.

This is a suit on a return bond executed by the defendants in a replevin suit then pending before a justice of the peace. That suit was taken by appeal to the Circuit Court, and there dismissed; whereupon the defendant therein (the plaintiff here) instituted the present proceedings upon the replevin bond. At the trial of the present suit in the Circuit Court, the plaintiff offered to read in evidence the bond sued on. It was objected to by the defendants, and excluded by the court, on the ground that the justice before whom the replevin suit was brought, and in which the bond was given, had no jurisdiction of the action. For the same reason all the other evidence offered by the plaintiff was objected to and excluded—the court, in effect, holding that the plaintiff's petition disclosed no cause of action. The District Court took the same view of the matter, and the plaintiff brings the case here by appeal. I have searched the record in

vain to ascertain upon what specific ground it was held that the justice had no jurisdiction of the replevin suit. The record and the defendants' brief are equally silent on the subject. The pleadings show that the replevin suit was brought to recover possession, as of a personal chattel, of a "frame building" of the alleged value of seventy-five dollars. That amount is not in excess of a justice's jurisdiction in such cases. (Gen. Stat. 1865, p. 697, § 3.) But it would seem to have been supposed that the terms "frame building" *ex vi termini*, imported real estate, and that the suit for the recovery of the building should, therefore, have been brought in ejectment, and before a higher court. Whether the building was attached to the realty and constituted a part of it, or was a mere personal chattel, was a point to be settled by the evidence, and not by an examination of the pleadings; for the pleadings, beyond the designation of the property sued for, as a frame building worth seventy-five dollars, disclosed nothing on the subject. It does not follow from the circumstance that the property sued for was a building, that it was therefore real estate. A building may be either real or personal property, according to the uses to which it is applied, whether permanent or temporary in its character, and according to the purposes intended to be subserved by it. The petition discloses nothing that should oust the justice of his jurisdiction.

Where the complainant in a replevin suit fails to prosecute his suit to a successful issue, that failure constitutes a breach of the conditions of his return bond, and warrants a suit upon it, although there may have been no judgment in the replevin suit, either for damage or a return of the property. (Berghoff v. Heckwolf, 26 Mo. 511; Hansard v. Reed, 29 Mo. 472.) Nor is it perceived that there is a distinction, in this respect, between suits originating before a justice and those which are brought to the Circuit Court in the first instance.

The other judges concurring, the judgment will be reversed and the cause remanded.

A. D. CHRISTY *et al.*, Appellants, v. JOSEPH KAVANAGH *et al.*,  
Respondents.

1. *Deeds—Lost instrument—Proof of loss, what sufficient—How determined.*  
—In order, under the statute (Gen. Stat. 1865, p. 448, § 38; Wagn. Stat. 279, § 38), to introduce secondary evidence of the contents of a deed, parties should show that they have in good faith reasonably exhausted all probable sources of information and means of discovery which the facts and circumstances of the case are calculated to suggest, and which are at the time within their reach. But no definite rule on the subject, applicable to all cases, can be laid down. The question whether the loss is sufficiently proved in any given case must be determined by the judge trying the cause, and is addressed to his judicial discretion.

*Appeal from Fourth District Court.*

G. D. Burgess, for appellant.

Plaintiffs made out a *prima facie* case of the loss or destruction of the original; and when this is the case, a copy or the record of the original may be read in evidence. (Gen. Stat. 1865, pp. 447–8, §§ 35–38; Taunton Bank v. Richardson, 5 Pick. 441; Minor v. Tillottson, 7 Pet. 99; Davis v. Spooner, 3 Pick. 284; Turnispeed v. Freeman, 2 McCord, 269; Ward v. Fuller, 15 Pick. 187; Southerin v. Mendum, 5 N. H. 428; Hewes v. Wiswell, 8 Greenl. 94; Scanlan v. Wright, 13 Pick. 523; Eaton v. Campbell, 7 Pick. 10; Hathaway v. Spooner, 9 Pick. 26; Poignard v. Smith, 8 Pick. 272; Taylor v. Riggs, 1 Pet. 591; Knox v. Silloway, 1 Fairf. 201; Burghard v. Turner, 12 Pick. 534; Kent v. Weld, 2 Fairf. 459; 7 N. H. 475; 7 Greenl. 181; 17 Wend. 338.)

A. W. Mullins, for respondent.

The record of the deed from Smith to Gaile was properly excluded. The preliminary proof was insufficient. (Gen. Stat. 1865, ch. 109, §§ 35–38; Barton v. Murrain, 27 Mo. 235; Mariner v. Saunders, 5 Gilm. 113, 117; 1 Greenl. Ev., § 558; Jackson v. Hasbrouck, 12 Johns. 192; Dan v. Brown, 4 Cow. 483.)

CURRIER, Judge, delivered the opinion of the court.

This is an ejectment for a quarter-section of military bounty land situated in the county of Linn. In the progress of the trial, it became necessary for the plaintiffs to show the loss or destruction of a deed appearing in their chain of title, in order to the introduction under the statute (Gen. Stat. 1865, p. 448, § 38) of secondary evidence of its contents.

The plaintiffs submitted preliminary proof of loss, and then offered in evidence a copy of the original deed, duly certified by the recorder of the county where the same was recorded, but the court excluded it on the ground that the preliminary proofs did not sufficiently establish the loss of the original instrument. The plaintiffs thereupon took a non-suit, etc. The record presents for consideration the single question of the sufficiency of the plaintiffs' preliminary proofs.

It appears, from the copy offered in evidence, that the original deed was executed by David Smith, February 6, 1822, and that it purported to convey to one Andrew Gaile the premises in dispute. The deed, as shown by the copy, described Smith as of St. Louis, Missouri, but failed to indicate the residence of Gaile. Although the deed represented Smith as of St. Louis, the appended acknowledgment, taken on the day of the date of the deed, is certified as taken by a justice of the peace of Franklin county, Indiana, whose official character the Circuit Court clerk of that county certifies under date of January 24, 1860. The original deed appears to have been recorded in Linn county, where the land lies, on the fourth day of February, 1860.

It thus appears that the instrument which is supposed to be lost was carefully preserved for a period of nearly forty years—namely: from its date, February 6, 1822, to the time of its recording in 1860. The last that seems to have been known of the missing document it was in the possession of the county recorder, where, for aught that is shown by the plaintiffs' preliminary proofs, or that otherwise appears, it still remains. It is traced to the recorder's office, and there disappears. That was its last known place of deposit; but no search for it there

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appears to have been made; nor does it appear that any inquiry was made of the recording officer respecting it; nor is it shown that any inquiry was made of the Indiana circuit clerk respecting the person who procured him to certify to the official character of the justice. Whoever procured the certificate and the subsequent recording of the deed, could probably give some useful information in relation to it. The preliminary proofs do not show that the search for Gaile himself was particularly thorough and exhaustive.

The plaintiffs should show that they have in good faith reasonably exhausted all probable sources of information and means of discovery which the facts and circumstances of the case are calculated to suggest, and which are at the same time within their reach. It is not practicable to lay down a definite and comprehensive rule on this subject that shall meet the exigency of all cases and accurately define the degree of diligence which the party must employ in his search for a missing instrument. Each case depends more or less upon its own peculiar circumstances, and these circumstances must suggest the extent and thoroughness of the search. (1 Greenl. Ev., § 588; Barton v. Murrain, 27 Mo. 235; Mariner v. Saunders, 5 Gilm. 113.)

The question whether the loss of a missing instrument in any given case is sufficiently proved, is to be determined by the judge trying the cause, and is addressed to his judicial discretion. (1 Greenl. Ev., § 588.)

In the case at bar, I am of the opinion that the plaintiffs' preliminary proofs were correctly held insufficient, and I therefore recommend an affirmance of the judgment. The other judges concur.

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EDWARD FORCHT *et al.*, Plaintiffs in Error, v. W. L. SHORT *et al.*, Defendants in Error.

1. *Mechanics' lien—Limitation of actions.*—The law limiting the time for commencement of suit after filing the account under mechanics' lien, which was in force at the time of beginning such suit, must prevail over such law of limitation which prevailed at the time of filing the account. (Hauser v. Hoffman, 32 Mo. 334, affirmed.)



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*Error to Fourth District Court.*

*Jones & Brock*, for plaintiffs in error.

*Williams & Eberman*, for defendants in error.

The plaintiffs in error should have brought their action within ninety days from the first day of August, 1866, and, failing so to do, they lost their lien. (Gen. Stat. 1865, p. 883, § 4; 32 Mo. 334; *Stocking et al. v. Hunt*, 3 Denio, 274.) Statutes of limitation act exclusively upon the remedy. (*Jackson v. Lamphire*, 3 Pet. 280; *Rexford v. Knight*, 11 N. Y. 308; *Waltemire v. Westman*, 14 N. Y. 20; *Strong v. Crowninshield*, 4 Wheat. 122; *Hawkins v. Goold*, 11 N. Y. 281.)

CURRIER, Judge, delivered the opinion of the court.

This is a proceeding to enforce a mechanics' lien. It appears from the record that the account sued on, and which constituted the foundation of the lien, accrued on and prior to the first day of December, 1865; that the lien was filed February 24, 1866; and that this suit was commenced November 15, 1866, less than nine months after the filing of the lien, and more than ninety days after the General Statutes took effect—that is, more than ninety days after August 1, 1866. By the general law in force prior to August 1, 1866, lienors were allowed nine months after the filing of the lien in which to bring suit; by the General Statutes the time was limited to ninety days. (Gen. Stat. 1865, p. 767, § 16.)

The case presents the single question whether the prior law or the General Statutes determines the time within which the suit must be brought in order to save the lien. The question is definitely settled by a decision of this court in *Hauser v. Hoffman*, 32 Mo. 335, where it is decided that the subsequent law must control. In *Dollner v. Rogers*, 16 Mo. 340, Judge Scott says: "The lien created in favor of mechanics and its mode of enforcement are both mere creatures of the statute. They have no common-law authority whatever on which to stand."

The judgment must be affirmed. The other judges concur.

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Singleton v. Townsend, Adm'r.

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HENRY T. SINGLETON, Appellant, v. ELLISON TOWNSEND, ADM'R,  
etc., Respondent.

1. *Bills and notes — Contribution — Suit for, by co-surety — Statute of limitations.*— In case of suit for contribution by a surety on a bill of exchange against his co-surety, the statute of limitations commences running against his claim from and after the day on which he paid the original judgment on the bill, and not from the time when the bill was dated; and his claim is not operated on by the limitation of ten years, but by that of five

*Appeal from Fifth District Court.*

*Heren & Rea*, for appellants.

The limitation in this case was ten, and not five, years. (1 Pars. on Cont. 471, note c, p. 35.)

*Kelly & Davis*, for respondents.

In the case of one surety paying the debt of the principal, or more than his aliquot part, a right of action accrues to him for contribution; and hence the statute of limitations begins to run against him at the time of such payment, and not until then. (Chit. on Cont. 814-16; Chit. on Bills, 610; 1 Pars. on Cont. 36; 2 Pars. on Cont. 370, 372; 3 Pars. on Cont. 90, 91; 2 Sto. on Cont. 643, § 1011; 2 Pars. on Notes and Bills, 254, § 7; Ang. on Limit. 118, 119; 12 N. Y. 470; 6 Iowa, 516; 25 Iowa, 300, 304; 1 Metc. 387.)

CURRIER, Judge, delivered the opinion of the court.

The defendant's intestate and the plaintiff were accommodation parties to a bill of exchange. The bill matured September 2, 1861, was sued upon and went into judgment April 17, 1862, and the judgment was paid in full by Singleton, September 18, 1863—the principal debtor, in the meanwhile, having become insolvent. This suit was commenced June 21, 1869, more than five years after Singleton paid the judgment, but less than ten years from the maturity of the original bill. The statute of limitations is interposed as a defense, and the only question

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presented for consideration is whether the limitation of ten, or that of five years, applies to the case.

Ordinarily, the only difficulty to be overcome, in determining whether a claim is barred by the statute, consists in fixing definitely the date when the limitation commenced running. This being settled, the rest is usually easy. In the case at bar, the statute commenced running against the claim sued upon on the day Singleton paid the judgment, and not till then. He then, and not till then, acquired a right of action against his co-surety for contribution. So much is clear and certain. (1 Pars. on Cont. 36; 2 Pars. on Notes and Bills, 254, § 7; Walker v. Lathrop, 6 Clarke, Iowa, 516; Burry v. Ransom, 12 N. Y. 470-1, and cases cited in the opinion of the court.) The statute of limitations applicable to the case must therefore be a statute that commenced running against the plaintiff's demand from and after the day on which the judgment was paid. But the ten years' limitation contended for did not commence running at that time. It had already then been in progress for more than two years, and could not, therefore, operate upon the cause of action upon which this suit is based. In a word, the plaintiff is not suing upon the original bill of exchange, or upon any express undertaking of the defendant, but simply upon a promise which the law implies, and which springs out of the antecedent relations of the parties. The plaintiff had no cause of action against the defendant until he paid the debt, and the statute could not commence running adversely to a cause of action that had no existence, nor until a right to sue had accrued. The plaintiff would have had the right to sue at any time within five years of the date of payment, although he had not paid the judgment till the last month of the supposed ten years' limitation. This shows that his claim is not operated upon by the limitation of ten years, but by that of five years. *Moorman v. Sharp*, 35 Mo. 283, was a suit founded directly upon a written instrument, and the decision has no application to this suit, which is indisputably founded upon an implied promise.

The foregoing views involve an affirmation of the judgment. The other judges concur.

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House v. Lowell et al.

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HIRAM HOUSE, Plaintiff in Error, v. JOHN W. LOWELL *et al.*,  
Defendants in Error.

- 1 *Practice, civil—Pleadings—Objections to petition—What can not be made by motion in arrest.*—An objection to a petition for misjoinder of counts, or a union of several causes in one count, if not made by demurrer or motion to strike out, will be deemed to have been waived (Wagn. Stat. 1015, § 10), and can not be raised by motion in arrest of judgment. (Hoagland v. Hann. & St. Jo. R.R. Co., 39 Mo. 451, overruled.)

*Error to Sixth District Court.*

*Ensworth & Carter*, for plaintiff in error.

*Strong & Chandler*, for defendants in error.

BLISS, Judge, delivered the opinion of the court.

The defendant claims that the petition unites different causes of action, without being separately stated, with the relief sought for each, as required by the statute. (Wagn. Stat. 1012, § 2.) He made no objection, either by demurrer or motion, to this alleged misjoinder; but answered, denying the facts set forth in the petition, and went to trial. At the trial he objected to any evidence upon the ground of such misjoinder, and moved in arrest of judgment for the same reason.

The court held that the objection came too late, but its judgment was reversed in the District Court. Section 6 of article 5, "of pleadings," etc., p. 1014, enumerates the causes for which a defendant may demur to a petition, among which is, "fifth, that several causes of action have been improperly united;" and section 10 of the same article provides that if the objection do not appear upon the face of the petition, it may be taken by answer; but "if no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same." The court, in a case hereinafter cited, seems to have held, though indirectly, that the improper joinder of causes of action referred to in the fifth subdivision of section 6, above quoted, refers as well to the improper commingling in the same count of causes of action that might have been joined, if separately

stated, as to the improper joinder of different causes of action in different counts, inasmuch as it holds that the first as well as the second error can be reached by demurrer. The matter often came before the different judges of the Supreme Court of New York, whose statutes contain the same provision as ours, and it was held by some that causes of action were improperly united when they were not separately stated, and that the defect should be taken advantage of by demurrer; while others decided that the clause did not refer to the manner of the union of causes, but to the union itself, and that the prohibition against the improper commingling of causes in one count is but one of the rules of pleading contained in the code, and should be enforced by motion. The latter view has been sustained by the Court of Appeals in *Bass v. Comstock*, 38 N. Y. 21. The same view was taken by our own court in *Otis v. Michigan Bank*, 35 Mo. 128, and in *Mooney v. Kennett*, 19 Mo. 551. But so far as the decision of the present case is concerned, it does not matter whether we hold that the defendant should have objected to the impropriety in the joinder by demurrer, or by motion to strike out all that does not pertain to one cause of action as redundant or irrelevant; for if by demurrer, he is expressly held by the statute to have waived the objection; or if by motion, the insertion of the redundant or irrelevant matter, or the failure to separate the cause of action, is one of those formal defects cured by verdict. I am aware that it has been held by this court that either of these improper joinders can be reached by motion in arrest. In *Hoagland v. The Hann. & St. Jo. R.R. Co.*, 39 Mo. 451, the court held that both for a misjoinder of counts and for a union of several causes in one count, the motion in arrest of judgment should have been sustained (p. 457); and, for authority, reference was made to *Clark v. the same defendant*, 36 Mo. 202. In the latter case, on page 215, the court held the count under consideration, containing three causes of action, to be "for this reason clearly bad on demurrer or on motion in arrest;" and reference is made to *McCoy v. Yager*, 34 Mo. 134, where the defendant had demurred to a petition upon the ground that two causes of action were combined in one count, and the court decided that the

demurrer should have been sustained. If the defect mentioned in the last two cases can be reached by demurrer, as is expressly held, it seems plain, both according to the express language of said section 10 and of section 12 of the chapter of amendments (Wagn. Stat. 1026), that the objection, on account of the defect, is waived, and that the judgment can not, therefore, be arrested or reversed. I am compelled to think that the opinions referred to in *Hoagland v. Hann. & St. Jo. R.R. Co.*, and in *Clarke v. same*, were pronounced inadvertently and without sufficiently considering the force and effect of said section 10 and of the statute of *jeofails*. I am the more impressed with this conviction from the fact that the court has in other cases held that a motion in arrest will not lie for defects enumerated in said section 6. (*Jones v. Steele*, 36 Mo. 324.) The reasons are not given that induced the court to come to its conclusions in *Hoagland v. Hann. & St. Jo. R.R. Co.*, and I should be very reluctant—indeed, quite unwilling—to dissent from them, did they not conflict in principle with those arrived at in other cases, with what seems to me to be the plain language of the statute, and with its liberal and beneficent object. The opportunity is offered, by demurrer and motion, to settle before trial all questions of pleadings; and if the opportunity is not embraced, defects should be held to have been waived, and the verdict should not be disturbed. There are, it is true, some reservations, and they are all that can be demanded by justice and the merits of the case; and hence it is provided that whether the defendant demurs or not, he may still, by motion in arrest or otherwise, object to the jurisdiction of the court over the subject-matter of the action, or show that the petition does state facts sufficient to constitute a cause of action. These objections are vital, and a record can not stand when such defects appear. All others are more or less formal; and to give the statute a construction that, in a case where the plaintiff has alleged real grievances, and where the court has authority to redress them, shall permit the defendant to lie by, go to trial upon the merits, accumulate costs, and, if defeated, arrest the judgment, because the petition contains too many grievances, or is informally constructed, would make pleadings but a trap for the unwary, and



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defeat the great end of the code. I am aware that under the old system, while many defects were cured by verdict, either by intendment or by the statute of *jeofails*, a misjoinder of causes of action in different courts of the same declaration, as trespass *vi et armis* and trespass on the case, was fatal upon error or on arrest, as well as upon demurrer (*Cooper v. Bissell*, 16 Johns. 146; 1 Chit. 236); and the reason given was that the judgments would be incongruous. But under our code that reason does not exist, and the objection is waived if not made in the first instance.

The judgment of the District Court is reversed, and that of the Court of Common Pleas affirmed; the other judges concurring.

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JOHN THOMAS AND WIFE, Plaintiffs in Error, v. JOSEPH BABB AND WIFE, Defendants in Error.

1. *Practice, civil—Instructions directing a verdict on a certain state of facts, must embrace all.*—An instruction which hypothecates a state of facts, and upon their existence directs a verdict, is improper unless all the facts are hypothecated which are necessary to sustain a verdict.
2. *Lands and land titles—Possession must be adverse.*—Possession, to give title, must not only be continued, open, and notorious, but adverse.
3. *Lands and land titles—Occupation by mistake or ignorance, effect of—Disseizin.*—If defendant in an ejectment suit, erected his fence accidentally upon plaintiff's land, through mistake or ignorance of the correct line separating the tracts, and without intending to claim beyond the true line, then the line of occupation thus taken, and the possession that followed it, did not work a disseizin.
4. *Practice, civil—Instructions, requisites of.*—Each instruction must be correct in itself; all must be consistent with each other; and the whole taken together must present but one doctrine.
5. *Ejectment—Occupation by plaintiff's permission, effect of—Damages—Improvements.*—If the evidence in an ejectment suit showed that defendant occupied plaintiff's land by his license, the former would not be liable to the same measure of damages or be deprived of the benefit of his improvements, as he would had his possession been wrongful.

*Error to Fifth District Court.*

*Broadbuss & Pollard*, and *Dixon*, for plaintiffs in error.

Where a party claims beyond the true line, through mistake, lapse of time merely does not give the title. (St. Louis University

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v. McCune *et al.*, 28 Mo. 485; 22 Mo. 266-8; Boyd *et al.* v. Doty *et al.*, 8 Ind. 370; Brown v. Gay, 3 Greenl. 126; Ross v. Gould, *id.* 204; Cleaveland v. Flagg, 4 Cush. 76.)

*McFerran*, for defendants in error.

Instruction No. 9, taken in connection with those given for plaintiffs in error, with reference to the statute of limitations, presented the case properly to the jury on behalf of the plaintiffs in error. (McKeon v. Citizens' Railw. Co., 43 Mo. 405; 3 Washb. on Real Prop. 127, 142-3; 39 Verm. 583; 10 Mass. 294; 7 N. H. 436; 5 Pet. 439.)

BLISS, Judge, delivered the opinion of the court.

The controversy in this case pertains to a disputed boundary, and plaintiffs bring ejectment to recover possession of a portion of the land of the wife, claimed to be fenced in by the defendant. The title of the plaintiffs to the forty acres, of which it is claimed the disputed parcel is a part, is admitted to be in Mrs. Thomas, and the title to the farm within which the disputed land is inclosed is admitted to be in Mrs. Babb; and it is also admitted that she and her husband had been in possession of the same for more than ten years before the commencement of the suit. The plaintiff employed the county surveyor to locate the land, and, unable to find the original monuments indicating the boundaries of section 5, in which the disputed land lies, he runs lines from known monuments in the north line of the township, five miles south to other monuments, and finds a surplus of some thirteen and a half chains. This surplus he divides among the several sections, which has the effect of making the south line of section 5 over two chains more than a mile from the north line. This adjustment of the lines of the sections and of their subdivisions, throws the division line between plaintiffs and defendants some eight rods south of the division fence. Several questions were raised at the trial by the rejection of evidence offered by defendants, and by refusing instructions asked for by them, which, inasmuch as they obtained judgment, it is unnecessary to consider. But the court, at their instance, gave instruction No. 9, to which

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the plaintiffs objected, and which must have secured for the defendants their verdict. It is as follows: "If the jury believe from the evidence that the plaintiffs claim title under one Robert McCullough, who, in the year 1857 or 1859, went to what was then supposed to be the south line of plaintiffs' tract, in which the land in controversy is situated, and stuck a stake in the ground on said supposed line, in the presence of the defendant, Joseph Babb; and then and there told the defendant, Joseph Babb, that any improvements made by him south of said line would be safe, or words to that effect; and that afterwards the defendants, or those under whom they claim, made a fence and other improvements south of said line; and that the lands claimed by the plaintiffs are south of, and adjacent to, said supposed line; and that the defendants, and those under whom they claim, have been in continued, open, and notorious actual possession of the lands sued for, for more than ten years before the institution of this suit, then the jury will find for the defendants."

The defendant, Joseph Babb, who was supported by other witnesses, had testified that in 1857 he pre-empted the land now owned by his wife; that he hauled lumber upon what he supposed was the north end of the lot, in order to make improvements; that Robert McCullough, under whom the plaintiffs claim, came to where he was hauling it; that he had stepped off the distance from the north, and told Babb he was too far north; that he then stepped on some two hundred steps further south, stuck a stick in the ground and said, "If you build south of here, you will be forever safe." Babb then moved his lumber further south and built his house; he also built his fence upon the line as indicated by the stick, and has ever since occupied up to the fence. McCullough differed somewhat in his description of the occurrence; but there is no dispute that defendants have ever since occupied the land up to the fence, and made improvements upon the part now claimed by the plaintiffs. The instruction above recited was given in reference to this testimony.

The instruction is erroneous. It hypothecates a state of facts, and upon their existence directs a verdict for defendants. An instruction in this form is proper, provided all the facts are

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hypothecated necessary to sustain the verdict. But the law will not warrant such a verdict if no more is found than what is required by this instruction. The court seems to have forgotten entirely that possession, to give title, must not only be "continued, open, and notorious," but must be adverse. There must be a disseizure—an intention to claim the title—something more than a mistake. It is not uncommon for adjoining proprietors, in making their division fences, to mistake the true line of division. Sometimes they intend to make the line of the fence the actual boundary of their separate property, claiming and occupying up to it as the individual property of each, and each understanding the character of the claim and occupancy of the other; but sometimes, also, they make the fence as a division of convenience, mistaking or ignoring the true line; or one of them may make it as part of a necessary inclosure, without intending to claim beyond the true line. In the one case, the occupancy would be adverse; in the others, it would not. (*Burrell v. Burrell*, 11 Mass. 293.) The Supreme Court of Maine, in *Ross v. Gould*, 5 Maine, 212, says: "A disseizin can not be committed by mistake, because the intention of the possessor to claim adversely is an essential ingredient in a disseizin; and for the same reason, mere mistake will not constitute an abandonment of possession." (See 3 Washb. on Real Prop. 491, 500, and cases cited.) Our own Supreme Court, in *St. Louis University v. McCune*, 28 Mo. 485, says: "If the plaintiffs erected their fence accidentally upon the defendants' land, through mistake or ignorance of the correct line separating the tracts, and without intending to claim beyond their true line, then the line of occupation thus taken, and the possession that followed it, did not work a disseizin." The court declares the same doctrine in *Cutter v. Waddingham*, 22 Mo. 206, 266-7. Such being the settled law, the error of the instruction is apparent. "Continued, open, and notorious actual possession" of real estate for over two years is far from being sufficient of itself to give title.

The defendants claim, however, that the defects of this instruction are supplied by other instructions given on behalf of the plaintiffs. It is true that those asked for by the plaintiffs were

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all given, and that some of them were inconsistent with the case under consideration, and negatively presented the law correctly. But where inconsistent directions are given to the jury, how are they to judge which are correct? One may sometimes supply a defect in another; but the one now complained of, by its terms, purports to cover the whole case, and leaves nothing to be supplied. Each instruction must be correct in itself as far as it goes; they must all be consistent with each other; and the whole taken together must present but one doctrine, or the jury will have nothing to guide them.

If it should appear upon another trial of this case that there was an actual mistake in the boundaries, as claimed by the plaintiffs, and that defendants have not acquired title by possession, it does not necessarily follow that they have no rights in the premises. There is testimony tending to prove license, if nothing more, in which case the defendants would not be liable to the same measure of damages or deprived of the benefit of their improvements, as if their possession had been wrongful. (See *Fahr v. Dean*, 26 Mo. 116.)

The other judges concurring, the judgment is reversed and the cause remanded.

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E. H. NORTON, GUARDIAN, etc., Defendant in Error, v. GEO. QUIMBY *et al.*, Plaintiffs in Error.

1. *Justices' courts — Transcripts — Executions — Returns touching summons — Execution returned within the time authorized by law, effect of — Collateral proceedings.*—In case of suit to set aside a sheriff's sale made under an execution issued in the Circuit Court upon a justice's transcript, the certificate of the justice appended thereto, that summons against defendant was returned "executed as the law directs," was sufficient evidence of proper summons, without the necessity of setting forth the same. Nor can the sale be impeached because the execution in the justice's court was returned unsatisfied sooner than the time authorized by law. For these irregularities the execution may be quashed in direct proceedings for that purpose, but not in collateral proceedings when the rights of third parties intervene.

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*Error to Fifth District Court.**Doniphan & Stringfellow*, for plaintiffs in error.

The deed of the sheriff should have been excluded, not containing the recitals required by law. (36 Mo. 115; 35 Mo. 239; 37 Mo. 194.) The transcript of the judgment before the justice did not sustain the authority of the sheriff to sell. (Coonce v. Munday, 3 Mo. 265; 4 Mo. 116.) The issue and return of the execution could only be evidenced by the constable's return, which was never made. (Carr v. Youse, 39 Mo. 346.) The return of the constable is not shown by copy or proved to have been signed. (Bennett v. Vinyard, 24 Mo. 216.)

*H. M. & A. H. Vories*, for defendant in error.

The executions in evidence may have been irregular, but they were not void. The court might, and perhaps would, as between the original parties, upon motion, have set aside or quashed the execution; but when the rights of third persons have intervened, such irregularities will not be inquired into in this collateral way. (Crawley v. Wallace, 12 Mo. 143; Murray v. Laften *et al.*, 15 Mo. 621; Dillon v. Rash, 27 Mo. 243.) The title of a purchaser at sheriff's sale would be good, even if the officer should fail to make a sufficient return, or any return at all.

WAGNER, Judge, delivered the opinion of the court.

Quimby, one of the defendants, in 1861, executed to Marshall a mortgage on two tracts of land lying in Platte county, to secure a debt of about eighteen hundred dollars. This suit was brought by Norton, the plaintiff, as guardian of one of the heirs of Marshall, to whom the debt secured by the mortgage had been allotted on distribution, to foreclose the equity of redemption and sell the land.

Quimby, the maker of the mortgage, and others who claimed the land under sales made on judgments rendered against him subsequent to the mortgage, were made defendants. The proceedings in this case are singular. None of the defendants



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dispute the right of the plaintiff to recover on the note, or to have the equity of redemption foreclosed and the land sold to satisfy the indebtedness. But Quimby filed what he called an answer and cross-bill, attacking the sales made under the judgments, seeking to avoid them on account of certain alleged irregularities, charging fraud, combination, and unfairness in the execution sale, and claiming the surplus, whatever it might be, after satisfaction of the mortgage debt.

The other defendants, claiming the premises as purchasers under the executions issued on the judgments against Quimby, deny all the allegations set up in Quimby's answer or cross-bill, and assert that as the owners of the equity they are substituted to all the original rights of Quimby, and that the amount left, after paying off the mortgage debt, should be decreed to them. The Circuit Court gave judgment for the plaintiff, and decreed as prayed for in the answers of the defendants, an affirmance being had in the District Court. Quimby sued out his writ of error.

As far as any fraud or combination is concerned, the case is utterly barren. Quimby does not aver that either of the defendants, who claim as purchasers, were guilty of any fraudulent acts or improper practices, by which his rights were prejudiced; and, moreover, there was no evidence submitted to substantiate the charge. This branch of the case, then, may be dismissed without comment. It only remains, therefore, to determine whether the executions authorized the sale, or whether there was such a defect as would impair the title in the hands of the purchasers at the sheriff's sale. It seems that the land was sold on four several executions, two of which issued from judgments obtained in the Platte Circuit Court against Quimby; the other two were issued upon transcripts filed in the clerk's office from the dockets of justices of the peace.

The main objections urged in this court are that the transcripts do not show any sufficient service on Quimby to warrant the judgments, and that the executions issued by the justices were made by law returnable in ninety days, and that the constable returned them in less time.

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The certificate of the justices appended to the transcripts states that returns were made by the constable, that the summons were served, and "returned executed as the law directs." The executions were returned by the constable, one in fifty-nine days, the other in sixty-one days. The case of Coonce v. Munday, 3 Mo. 373, principally relied upon by the counsel for the plaintiff in error in this court, has been greatly modified and to a certain extent overruled by subsequent decisions, and can no longer be regarded as authority for the broad doctrine therein adjudged. In Crowley v. Wallace, 12 Mo. 143, it was held that the failure of a constable to specify in his returns how or where he served the writ would not vitiate all the subsequent proceedings had upon it, so that they might be pronounced void in a collateral suit, and that if the transcript filed in the clerk's office showed that an execution had been issued by the justice, and returned "no property found," it was not necessary in a collateral suit to produce the original execution to show that an execution was properly issued by the clerk. Where an entry was made on the justice's docket stating that an execution was issued at a certain date and given to the constable of the proper township, and it was returned by the constable that there was no property found to levy the same, with the constable's name attached thereto, and the justice certified that it was an entry made on his docket, it was held that when the same was filed with the clerk it was sufficient evidence that an execution had been issued by the justice of the peace and delivered to the constable, and that that officer had returned the same *nulla bona*, and fully warranted the clerk of the Circuit Court in issuing execution on the transcript. (Franse v. Owens, 25 Mo. 329.)

So it has been decided that a copy from the docket of a justice of the peace, certifying that an execution issued to the constable of the township in which the defendant resided, and setting out the return of the constable of "no property found," is *prima facie* evidence to authorize the clerk of the Circuit Court to issue an execution upon the transcript of the justice's judgment filed in his office, though upon a direct motion to quash the execution the defendant would be at liberty to show any defect or irregu-

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larity in the justice's process or the constable's return. (Ruby v. Hann. & St. Jo. R.R. Co., 39 Mo. 480.)

In the case of Murray v. Laften *et al.*, 15 Mo. 621, this question was well considered, and the court there observes that the justice's execution constitutes no part of the title of a purchaser who buys under an execution issued from the Circuit Court; that the purchaser who takes title under the process of the court, if he looks to, or is bound to look to, the records of the court for the foundation of the execution, finds a judgment which authorizes the execution, and he finds that an execution has been issued and returned before the justice, he takes his title by his purchase, subject only to such objections as show that the proceedings are a nullity. In that case the execution was returned before the return day. In Dillon v. Rash, 27 Mo. 243, it is adjudged that an execution issued by a justice of the peace can not regularly be returned before the return day thereof. Should it be returned *nulla bona* by the constable, and a transcript of the judgment of the justice be filed in the office of the Circuit Court, and an execution be issued by the clerk upon the judgment before the return day, the Circuit Court should quash the execution. But the proceeding in that case was on a motion made by the defendant to quash, and the court in the opinion say: "We are not prepared to say that a sale under an execution founded on a return like that in the present case would be regarded as a nullity in a collateral action when the interests of third persons were involved." That is not the question here. And again: "If the execution from the Circuit Court has been executed, and a person other than the plaintiff has become the purchaser of the land and received a deed, other considerations may arise than those which grow out of the present motion."

Now, whatever irregularities may have existed as respects the transcripts, they were not nullities. I entertain no doubt but that the execution issued upon them should have been quashed had a motion been made for that purpose. But the case stands very differently now. *Prima facie* they were good, and imparted authority to the clerk to issue executions upon them; the rights

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of other parties have intervened, who bought at the sale, and their interests can not be assailed collaterally. As the purchasers were not privies to any of the proceedings, their titles would not be divested, even though the judgments under which they bought were subsequently reversed or set aside. (Shields v. Powers, 29 Mo. 315; Gott v. Powell *et al.*, 41 Mo. 416; Hann. & St. Jo. R.R. v. Brown, 43 Mo. 294.)

It is insisted that this case presents a strong claim for invoking the equity jurisdiction of the court, but I see nothing in it requiring equitable interference. The judgment of the court below can not be molested without trenching on well-settled principles, disturbing titles, and destroying confidence in judicial sales. In the way and at the time the property was sold, Quimby may have been the loser, but we are unwilling to unsettle the law for his especial benefit. By attempting to avoid particular hardships, bad precedents are frequently made. Moreover, the sales were made by virtue of all four of the executions, and no objections are made against those issued upon the judgments of the Circuit Court.

The point is raised that the judgment should be reversed because a fee of fifty dollars was allowed the plaintiff as counsel in this suit. Although I am not aware of any authority the court had for making the allowance, still I do not see how Quimby, the only party who prosecutes the case in this court, is injured by it; and as the only parties interested in the matter make no complaint, he can not do it for them.

Judgment affirmed. The other judges concur.

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FINNESSE E. MCLEAN, Plaintiff in Error, v. JAS. H. MARTIN,  
Defendant in Error.

1. *Equity—Sheriff's sale—Misdescription—Purchase—Action for recovery of purchase money—Caveat emptor.*—A. owned certain described land in the north-west quarter of section *thirty-five*, township sixty, range thirty-six. Under execution against him, the sheriff, by mistake, sold and deeded to B. a tract similarly described in the north-east quarter of section *twenty-five* of the same township and range, to which A. had no title. The purchase money

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was paid, and went to extinguish the judgment against A. Supposing the land to be his, A. surrendered it to B., who moved on it and made improvements. Afterwards, discovering the misdescription, A. regained possession, claimed the land, and refused to refund the purchase money. *Held*, that the doctrine *caveat emptor* had no application to such a case; that the consideration for the money paid on execution had failed, B. having no title to the land, and that an action for the recovery of the money so paid was properly maintainable.

*Error to Fifth District Court.*

*H. S. Kelley and J. J. Davis*, for plaintiff in error.

One who purchases land at a sheriff's sale, supposing it to be that of the judgment debtor, pays the money, takes possession, and makes lasting improvements, and is afterwards dispossessed by the debtor, may recover back the amount of the purchase money, even when no fraud at the sale is imputed to the debtor. The doctrine of *caveat emptor* does not apply to the case at bar. (*Valle's Heirs v. Fleming's Heirs*, 29 Mo. 152; *Heath v. Daggett*, 21 Mo. 69; *Magwire v. Marks*, 28 Mo. 193.) The doctrine we contend for, and which we maintain has been expressly adopted and approved in this State by the cases cited, is recognized as sound equity law in several, if not all, of the States of the Union. (*Muir v. Craig*, 3 Blackf. 283; *Bunts v. Cole*, 7 Blackst. 268; *Dunn v. Frazier*, 8 Blackf. 432; *Preston v. Harrison*, 9 Ind. 1; *Pennington v. Clifton*, 10 Ind. 172; *Richmond v. Marston*, 15 Ind. 137; *Seller v. Lingerian*, 24 Ind. 264, 267; *Julian v. Beal*, 26 Ind. 220; *Hawkins v. Miller*, *id.* 173; 4 Scam. 489; 24 Ill. 281, 285; *Gwin on Sheriffs*, 357, 382; *Hudgins v. Hudgins' Ex'r*, 6 Grat. 320; *Howard v. North*, 5 Texas. 315; 21 Texas, 287, 772; *McGee v. Ellis*, 4 Littell, 244; *McLaughlin's Adm'r v. Daniel*, 8 Dana, 182; *Geoghegan v. Ditto*, 2 Metc., Ky., 324, 433; *Bentley v. Long*, 1 Strob. Eq. 43; *Dufour v. Camfranc*, 11 Martin, 615; *Haynes v. Courtney*, 15 La. Ann. 630; *Fenno v. Coulter*, 14 Ark. 114; 21 Conn. 451, 460; *Reed et al. v. Crosthwait*, 6 Iowa, 219; *Ritter v. Henshaw*, 7 Iowa, 97.) Plaintiff is entitled to recover for improvements. (Gen. Stat. 1865, p. 609, §§ 20-1; 35 Mo. 251; *Bright v. Boyd*, 2 Sto. 605; 29 Mo. 152; *Sedgw. on Dam.* 139; *Sto. Eq. Jur.*, Redf. ed., §§ 799, 1237-8, notes.)

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*Woodson, Heren & Rea*, for defendant in error.

The rule of *caveat emptor* applies in our State to sheriffs' sales of real estate under execution, and the purchaser buys at his peril. (10 Mo. 157; 29 Mo. 152; 25 Mo. 572; 14 Mo. 153; 37 Mo. 363.)

WAGNER, Judge, delivered the opinion of the court.

In this case a demurrer to the petition was sustained by the Circuit Court, and final judgment rendered for the defendant. Exception was taken, and the case appealed to the District Court, where the judgment was affirmed. The case is now here by writ of error. The petition sets forth the following facts, namely: that on the 8th day of October, 1863, Ellison Townsend, as public administrator, having in charge the estate of Samuel Elliott, deceased, recovered a judgment in the Andrew County Circuit Court against the defendant for the sum of \$1,636.39; that an execution was duly issued on said judgment, and by the sheriff levied on "one hundred and five acres, off the west side of the northeast quarter of section twenty-five, township sixty, range thirty-six," the sheriff supposing and believing that he was levying upon the land owned by the defendant; that at the sheriff's sale of said land, on the 6th day of April, 1864, the plaintiff, believing that the land belonged to the defendant, purchased the same for the sum of \$850, paid the purchase money to the sheriff, and received from him a deed for the land, and the purchase money was applied to the extinguishment of the judgment against the defendant; that the defendant had no title to, or interest whatever in, the land sold by the sheriff and purchased by the plaintiff, but did own, have title to, and, at the time, was in possession of, the west part of the northwest quarter of section thirty-five, township sixty, range thirty-six, one hundred and five acres, etc.; that the sheriff intended, supposed, and believed, at the time of making the levy and sale, that he was selling, and the plaintiff supposed and believed he was buying, the last-described tract of land which the defendant actually owned and possessed; but, being ignorant of the true description of the



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defendant's land, the sheriff, by mistake, misdescribed it in the levy and sale, making the first-named description instead of the latter; that afterward, by virtue of said sheriff's sale and deed, plaintiff entered upon and took possession of the last-described tract of land, which he supposed he had bought—the defendant surrendering the possession of the same to him—and, in good faith, made valuable and lasting improvements, by setting out thereon one thousand apple and other fruit trees, and otherwise repairing and improving the same to the amount of \$1,000; that on the 6th day of February, 1865, he sold and conveyed the land to one Valentine Gunselman, who from thence remained in possession, making lasting and valuable improvements thereon, until the — day of January, 1869, when the defendant, discovering the mistake in the description of the land by the sheriff, by some artifice, contrivance, or means unknown to the plaintiff, moved upon and took possession of said land, ousting and evicting the plaintiff, and Gunselman holding under him, from said premises, and still continues in possession of the same, whereby, and by reason whereof, plaintiff became liable to said Gunselman, and was compelled to and did refund to him the purchase money received for said land, and the interest thereon, and pay him for his improvements; that the defendant never had any title or right whatever to the first-described tract of land, or to any part or parcel thereof; that plaintiff did not take possession of the same, and that the sheriff's sale and deed conveyed to him no title or right thereto; wherefore the consideration for the payment of said \$850 to the sheriff, on the execution and judgment aforesaid against the defendant, wholly failed. Prayer for judgment for the sum of \$850 and interest thereon, and for the further sum of \$1,000 for improvements made on the premises.

There was an objection raised in the demurrer that the petition was multifarious and contained a misjoinder; but neither party has paid any attention to it in this court, and the essential point in the case is that the petition does not state facts sufficient to constitute a cause of action. The argument for the defendant in error is that the plaintiff has no claim for repayment or compensation; that he purchased at his peril, and that the doctrine of

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*caveat emptor* applies in judicial sales to the fullest extent. In support of this position, reliance is exclusively placed on several cases decided in this court. I will briefly examine the cases to see whether they are absolute authority for the doctrine contended for.

The first case is *Hensley v. Baker*, 10 Mo. 157. That was a case where a slave was sold, who had been wounded by a cut on the leg. The slave was present at the sale, and his leg was examined. The sheriff was heard to say that nothing was the matter with the leg but the scratch of a brier. Hensley, the purchaser, was told of the hurt the slave had received, though he was at the same time informed that the wound was healed. This information was derived from one of the plaintiffs in the execution, who said he had known the slave all his lifetime. After the slave was struck off to him, he refused to pay the money and complete his purchase, and, on a re-sale, the slave brought a less sum, and an action was commenced for the difference. In his defense he set up the unsoundness of the slave; and the court held that in sales by sheriffs there is no implied or express warranty of the title or soundness of the goods sold; that the rule *caveat emptor* applied to such cases. But it may be said of that case that it was the sale of a personal chattel, which was present and inspected at the sale, and we know of no authority for implying a warranty under such circumstances.

In *Owsley v. Smith*, 14 Mo. 153, it was held that a purchaser of land, at a sale conducted under an order made in a proceeding in partition, can not avoid the payment of the purchase money upon the ground of a failure of title; that such sales are made, like those under ordinary executions, without warranty of title, and that the deed executed conveys the interest, whatever it may be, of the parties to the proceeding, and is a bar against them and all persons claiming under them. Napton, J., in his opinion says: "It was not the intention of the Legislature to make the parties to a proceeding in partition responsible for the title, where it was directed to be sold. The whole object of this statute is to enable parties who have an undivided interest in lands, to divide that interest, whatever it may be. When a sale

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is made, no warranty attends the sale, nor is any authorized. The sheriff is required to sell as in case of ordinary executions at law. It is well understood by all parties, purchasers and others, that the purchaser under an execution buys the title of the judgment debtor, and nothing more." The judge then proceeds to remark that an action in respect to a partition makes ample provision for an investigation of the title; that if any person other than the petitioners or defendants claims any interest, he can be made a party and his claims adjudicated. In *Schwartz v. Dryden*, 25 Mo. 572, the rule established in *Owsley v. Smith* was affirmed, but there is a material difference between both those cases and the one now under consideration.

The case of *Heath v. Daggett*, 21 Mo. 69, is not reconcilable with a strict application of the maxim of *caveat emptor* to execution sales; and in *Magwire v. Marks*, 28 Mo. 193, it was decided that if a levy of an execution be made upon property not belonging to the defendant therein, and such execution be returned satisfied to the amount made by the execution sale, should the plaintiff in the execution be compelled to refund to the true owner the amount received by him from such sales, he will be entitled to have the satisfaction indorsed on the execution set aside, and to have an execution issued for the full amount of the judgment. The reasoning of the court was that the facts of the case showed that the plaintiff had received no benefit from anything which had been done under the execution, and that the defendant had received no injury; that the plaintiff had obtained no money, and the defendant had lost none; that both parties were placed *in statu quo*. The rule of *caveat emptor* was admitted to be the law of this State, but a section of the statute was referred to to show that the intention of the Legislature was not to extend its operation. A principle strongly analogous to the one contended for by the plaintiff in error in this case, was decided in *Valle's Heirs v. Fleming's Heirs*, 29 Mo. 152. It was there held that where land is purchased in good faith at an administrator's sale, which is void because the requirements of the statute are not pursued, and the purchase money is applied in extinguishment of a mortgage to which such land was subject

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in the hands of the owner, the purchaser will be subrogated to the rights of the mortgagee to the extent of the purchase money applied in the extinguishment of the mortgage, and the owner will not be entitled to recover possession until he repays such purchase money. The discharge of the encumbrance with the money of the purchaser at the sale was held to be a payment directly for the benefit of the debtors, and that it would be inequitable to permit them to recover the property without repayment of the purchase money.

In all the adjudicated cases in this court, hereinbefore alluded to, the precise question presented in this case has not come up. No case can be found in this State where money has been paid under such a complete misapprehension of facts; where a party has paid his money in good faith, and the payment has been applied to the discharge of the execution debt, and the other party has attempted to avail himself of the benefit of the payment, and to also hold the estate supposed to be purchased.

The question has frequently arisen in other States, and been decided in favor of the maintenance of the action. In Kentucky, the case of *McGee v. Ellis*, 4 Litt. 244, was upon the sale of a slave, which, it must be remembered, was held there to be real estate. It was a bill in chancery, brought by the purchaser, a third person (from whom the property had been recovered by another stranger), against the plaintiff and defendant, the creditor and debtor. The Court of Appeals held that the purchaser was entitled to recover in equity from the debtor, because, the debt being paid by the money of the purchaser, he would, in equity, be entitled to be substituted in the place of the execution creditor, so far at least as to enable him to maintain a valid demand against the debtor, but he could not recover of the creditor. As further illustrations of the same principle, see *McLaughlin's Adm'r v. Daniel*, 8 Dana, 182, and *Geoghegan v. Ditto*, 2 Metc., Ky., 433.

In Indiana, the first reported case is *Muir v. Craig*, 3 Blackf. 293. There Jennings obtained a judgment against Craig, and the sheriff levied the execution on a tract of land supposed to be the property of Craig, but which really belonged to the United

States. Muir purchased the same at sheriff's sale, and received a deed therefor. The purchase money was indorsed on the execution and applied to the satisfaction of the judgment. The complainant, Muir, then filed his bill to compel the defendant, who was the judgment debtor, to refund to him the amount of the purchase money for the land, paid by the latter to the sheriff; and it was decided by the court that a purchaser at sheriff's sale of land to which the execution debtor had no title, but which belonged at the time to the United States, could recover from the debtor, in equity, the amount of the purchase money paid to the sheriff, though no fraud in relation to the sale was imputed to the debtor. Blackford, J., in delivering the opinion of the court, said: "Craig's debt to Jennings has been paid by Muir. The consideration for that payment—viz: the land sold by the sheriff to Muir as Craig's property—having entirely failed, Muir must be entitled, under the circumstances of the case, to recover in equity from Craig, who had received the benefit, the purchase money paid to the sheriff for the land, with interest." This case was followed and approved in *Bents v. Cole*, 7 Blackf. 268; *Dunn v. Frazier*, 8 Blackf. 432; *Preston v. Harrison*, 9 Ind. 1; *Pennington v. Clifton*, 10 Ind. 172; *Richmond v. Marston*, 15 Ind. 137; *Seller v. Lingerman*, 24 Ind. 264; and in *Hawkins v. Miller*, and *Julian v. Beal*, 26 Ind. 173, 220. In Iowa the same rule obtains, and the same doctrine is approved. (*Reed v. Crowthwait*, 6 Iowa, 219; *Ritter v. Henshaw*, 7 Iowa, 97.) As sustaining the same view, see also *Hudgins v. Hudgins*, 6 Gratt. 320; *Howard v. North*, 5 Texas, 315; *Bentley v. Long*, 1 Strob. Eq. 43; *Dufour v. Camfranc*, 11 Martin, 615; *Haynes v. Courtney*, 15 La. Ann. 630; *Fenno v. Coulter*, 14 Ark. 114; *Peltz v. Clark*, 5 Pet. 482.

The cases just referred to, and the case we are now considering, are clearly distinguishable from those cited by the counsel for the defendant in error; and to decide this case for the plaintiff in error, it is not necessary to impair their force or qualify them in the least. Indeed, they are in harmony with the received doctrine as to the liability of purchasers at sheriffs' sales, and did we believe that they applied here, we should cheerfully follow

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them. But, with the exception of *Valle's Heirs v. Fleming's Heirs*, no such question has ever been before this court.

The plaintiff bought at a fair sale, and paid his money; that money was regularly paid to the creditor, and went to extinguish the judgment against the debtor. It was, then, so much paid for the use and benefit of the debtor. The debtor supposed that his land was sold, and surrendered it to the purchaser, who moved on it and made improvements. Afterwards, ascertaining the misdescription and finding the mistake, the debtor regains possession, and now claims the land, and refuses to refund the money which the purchaser paid for his use, and which was applied to the discharge of his debts. In other words, he avails himself of the benefits of the payment and holds on to the land besides. The claim is grossly inequitable and unjust, and ought not to be allowed, and I see no reason why the action is not maintainable.

As to the claim for improvements, it is not clearly within the provisions of the statute on that subject, but it seems to come within the reasoning of Judge Napton's opinion in *Valle v. Fleming*; but on this demurrer I will not discuss the question. My opinion is that the judgment should be reversed and the cause remanded for a new trial.

Reversed and remanded. The other judges concur.

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ELLISON TOWNSEND, ADM'R, etc., Respondent, v. CALVIN COX.  
*et al.*, Appellants.

1. *Judgment—Infants—Guardian ad litem—Void and voidable judgment.*

A judgment against an infant, who appears by attorney and not by guardian, although irregular and reversible on error, is merely voidable, and not absolutely void, so as to enable defendant to successfully resist a subsequent action upon it.

*Appeal from Fifth District Court.*

*Heren*, for appellants.

A judgment rendered against an infant defendant, who appeared by attorney and without a guardian, is an error of fact, and



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the infant can avoid such judgment at any time, even after his majority, when it is attempted to be enforced against him, by pleading the fact of his infancy at the rendition of the judgment. (6 Cow. 50; 14 Johns. 416; 15 Johns. 533; Dewitt v. Post, 11 Johns. 458; 17 Mo. 441; Graham's Prac. 746.)

*Kelly, Bassett & Van Waters*, for respondent.

I. The judgment sued on was not void, but voidable. (30 Mo. 425; 38 Mo. 349, 353; Porter v. Robinson, 3 Marsh., Ky., 254; 6 Dana, 88.)

II. If the defendant in the judgment, with a full knowledge of the judgment, permits an unreasonable time to elapse without taking any steps to correct the error or avoid judgment, he will be regarded as acquiescing in it, and such laches will preclude him from avoiding it. (Kemp v. Cook, 18 Md. 130; 22 U. S. Dig. 317.)

WAGNER, Judge, delivered the opinion of the court.

The respondent's intestate recovered a judgment, on the 5th day of November, 1853, in the Andrew County Circuit Court, against the appellants for the sum of one thousand dollars damages in an action of trespass *vi et armis*. The defendants were duly served with process, and appeared and defended the action by attorney. This action was brought upon that judgment, returnable to the October term, 1869. The defense set up in the answer in this case was that at the time the judgment was rendered, the defendant, Calvin Cox, was a minor under the age of twenty-one years; that he appeared by attorney, and not by guardian; and therefore the judgment was a nullity. The Circuit Court gave judgment for the plaintiff, which was affirmed by an equal division in the District Court.

The record clearly shows that at the time the judgment was rendered, in 1853, Calvin Cox was a minor in his twentieth year, and that he appeared and defended by attorney, no guardian having been appointed for him. The only question to determine, therefore, is whether the judgment was absolutely void, or whether it was merely erroneous and voidable.

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It is insisted that aside from the error in the proceeding, the judgment being to the infant's detriment, it was wholly void for that reason. Perhaps no subject in the whole range of the law has been more involved in contradiction and doubt than that in respect to the void and voidable acts of infants. The rule has been laid down by some courts that a contract clearly beneficial is binding upon an infant, and that one clearly prejudicial is void, and that such as may be either beneficial or injurious are voidable. In other courts this doctrine has been declared unsatisfactory and liable to exceptions, and Chancellor Kent says it must be admitted that the tendency of the modern decisions is in favor of the reasonableness and policy of a very liberal extension of the rule that the acts and contracts of infants should be deemed voidable only and subject to their election when they become of age, either to affirm or disavow them. (2 Kent's Com., 10th ed., 268.)

The foundation of the suit in which the judgment was given was a matter for which the infant was responsible, for an infant, equally with an adult, is liable for his frauds and torts; but the appearance was irregular, and the judgment would unquestionably have been reversible on error. A judgment rendered against an infant, appearing by attorney, may be set aside or recalled. (Powell v. Gott, 13 Mo. 458; Randalls v. Wilson, 24 Mo. 761.) In Powell v. Gott, *ubi supra*, it was held that a judgment against an infant defendant, who appeared by attorney, might be set aside upon motion made after the infant had arrived at age. In that case the judgment was rendered in 1841, and the motion to set aside was made in 1847. The court said that there was no limitation to be found in our statute book to a proceeding to correct a judgment of law founded upon an error of fact. But in all the cases which I have examined, where the infant has availed himself of his privilege, the proceeding was either by prosecuting his writ of error, or by a direct motion to set aside or recall the judgment.

Judge Napton, in Fulbright v. Cannefox, 30 Mo. 425, in speaking on the subject of judgments against infants where there was an appearance by attorney, says: "Such judgments are not

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nullities, but may be set aside on terms." And it is the conceded and established rule that all judicial acts against an infant, as judgment and decrees, without a guardian *ad litem*, are not void, but are voidable or confirmable at the option of the infant. (Austin v. Charlestown Female Seminary, 8 Metc. 196; Bloom v. Burdick, 1 Hill, 131; Barber v. Graves, 18 Verm. 292; Porter v. Robinson, 3 A. K. Marsh. 253; Beeler v. Bullitt, *id.* 280; Allison v. Taylor, 6 Dana, 87; Bourne v. Simpson, 9 B. Monr. 454; Kemp v. Cook, 18 Md. 130; Swan v. Horton, 1 Gray, 179.)

In the present case the judgment has been in existence about fifteen years since the defendant has attained his majority, and yet no proceedings have been taken to have it reversed, set aside, or vacated. Judgment records are of high solemnity, and both law and public policy require that they should be enforced unless their invalidity is most palpable. To enable a party to successfully defend against a judgment, the judgment must be void. Though a judgment is voidable, still that will not prevent a recovery on it whilst it remains in force. To prevent its operation, proceedings must be prosecuted to reverse or set it aside. (Fithian v. Monks, 43 Mo. 503.)

I think the judgment of the court below should be affirmed. The other judges concur.

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ISAAC V. PRATT, Appellant, v. SAMUEL MORROW, Respondent.

1. *Equity—Bill to rescind contract of sale of land—New consideration—Actual abandonment.*—A verbal agreement to rescind a contract under seal for the sale of land, made after payments are due, and founded upon no new consideration, unless followed by an actual abandonment of the sale by both parties and a restoration of the property so far as possible to the vendor, will be treated as invalid in a suit by the vendor for the stipulated purchase money.

*Appeal from Fourth District Court.*

*Burgess*, for appellant.

I. The objection of plaintiff to the admission of the evidence of the defendant which tended to show a parol release of the

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contract read in evidence by plaintiff, should have been sustained, because the contract was under seal, and the burden of the covenant could not be removed otherwise than by an instrument of equal solemnity with that creating it. (Rawle on Cov. 368; Rogers v. Payne, 2 Wils. 976; Kaye v. Waghorne, 1 Taunt. 428; Cordwent v. Hunt, 8 Taunt. 596; Harris v. Goodwin, 2 Man. & Gran. 405; West v. Blakeway, *id.* 729.)

II. To render a waiver of the performance of a contract effectual, it must have occurred before the contract was broken, since after breach, nothing short of an accord and satisfaction can be a bar to an action. (Shaw v. Hurd, 3 Bibb., Ky., 371; Cunebar v. Wane, 1 Smith's Lead. Cas. 146; Delacroix v. Bulkey, 13 Wend. 71; Eddy v. Graves, 23 Wend. 82; Seward v. Patterson, 3 Blackf. 353; Woodruff v. Dobbins, 7 Blackf. 582, and note to Cunebar v. Wane, 1 Smith's Lead. Cas. 461, and authorities there cited.)

III. Parol evidence was not admissible to establish the release. (Ontario Bank v. Root, 3 Paige, 481; Cozien v. Graham, 2 Paige, 181; Wildbahn v. Robidoux, 11 Mo. 659; Hasbrouck v. Tappen, 15 Johns. 200; Stead v. Dawber, 10 Ad. & E. 57; Blood v. Goodrich, 9 Wend. 68; Ladd v. King, 1 Rh. I. 224; Espy v. Anderson, 2 Harris, 508.)

*Mullins & Easley*, for respondent.

In equity, a contract under seal can be rescinded by a parol contract made after breach of the original contract. (3 Adams' Eq., Am. ed., 300; 1 Greenl. Ev., § 302 and notes; 2 Phillips on Ev. 695; 1 Halstead's Law on Ev. 213; Browne on Frauds, §§ 429-436 and notes; 1 Sugd. on Vend. and Purch., 7th Am. ed., 178; 1 Hill. on Vendors, p. 174, § 20; Bac. Abr. 27; Badwin v. Salten, 8 Paige, 473; Cummings *et al.* v. Arnold, 3 Mete. 486; Munroe v. Perkins, 9 Pick. 298.)

BLISS, Judge, delivered the opinion of the court.

The plaintiff brought suit in the Linn Circuit Court to recover the purchase money due upon a sealed contract for the sale of land, and the defendant set up a parol rescission of the contract

and want of title in the plaintiff. Before trial the plaintiff moved to strike out that part of the answer averring want of title, excepted to the overruling of his motion, and claims the benefit of the error. But the record shows that no evidence was offered and no instructions given upon that branch of the case, hence the plaintiff could have suffered no damage from the action of the court in regard to his motion, even if it were erroneous.

The contract was made in November, 1860, and the land lay next to other land occupied by defendant. It does not clearly appear whether the defendant took actual possession under the contract, the testimony of the parties being contradictory upon that point, but it does appear that in the latter part of 1862 the defendant left the country, and in 1867 returned and took possession of the property—claiming, however, that he took it under another person—and holds it adversely to the plaintiff. As to the alleged rescinding of the sale, the defendant is the only witness, and he testifies that in the fall of 1861, in a conversation with the plaintiff, the latter agreed to give up the contract, and in about a year after, upon plaintiff's return from the army, he again told him he was released. The plaintiff contradicts this statement; but inasmuch as the issue of fact has been passed upon by a jury, we will not weigh the evidence, but only consider the questions of law involved. Some of the payments were due at the time of the alleged release, and upon the trial the plaintiff objected to the defendant's testimony concerning the parol discharge, and also asked instructions sustaining his view of the matter, and objected to the instructions given for the defendant sustaining an opposite view. The defendant obtained judgment, which was sustained by the District Court.

The record fairly presents the question whether a verbal agreement to rescind a contract under seal for the sale of land, made after payments are due, which agreement is founded upon no new consideration, and is not followed by any action of either party in relation to the land or the writing, will be treated as valid in a suit by the vendor for the stipulated purchase money. The authorities are very numerous that bear or seem to bear upon this question, though in their application confusion may

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arise from want of proper distinction between simple contracts in writing and those under seal—between obligations actually due and those not matured—and between simple agreements merely to vary or rescind, and the acts of the parties in carrying those agreements into effect.

It is well settled that an executory contract in writing not under seal may, before breach, be varied by parol, either by enlarging the time, changing the mode of payment, or by putting an end to it altogether. (Goss v. Lord Nugent, 5 B. & Ad. 65; Cuff v. Penn, 1 M. & S. 26; Keating v. Price, 1 Johns. Ch. 22; Erwin v. Saunders, 1 Cow. 250; Low v. Treadwell, 12 Maine, 441; Cummings v. Arnold, 3 Mete. 486; 2 Phil. Ev. 694, 5th Am. ed., C. & H. notes.) But the new contract, if executory, must be founded upon a new consideration. (Thurston v. Ludwig, 6 Ohio St. 1.) It is also still the received doctrine that a sealed instrument can not be varied or abrogated by another agreement unless the latter is also sealed. "*Unumquodque dissolvitur eodem ligamine quo ligatur.*" (Broome's Legal Maxims, 6th Am. ed., 844-5, and cases cited; Harris v. Goodwin, 2 Man. & Gran. 505, 40 E. C. S. 664; West v. Blakeway, *id.* 729, 40 E. C. S. 828; Sellers v. Brickford, 8 Taunt. 31, 4 E. C. S. 27; Thompson v. Brown, 7 *id.* 556, 2 E. C. S. 535; Woodruff v. Dobbins, 7 Blackf. 582.) But this rule is subject to many modifications and apparent exceptions. If the contract varying the terms of, or abrogating, the specialty has been performed so that the obligor has received the full benefit of the change, or if the obligor has occasioned the breach, or has put it out of his power or that of the obligee to perform, he will not be permitted to avail himself of the default of the other party. A defense founded upon such variation is sustained by the highest equity, was in general available under a plea in bar as well as in chancery proceedings, and clearly can be made under the code. (Dickinson v. Cone, etc., 6 Ind. 128; Fleming v. Gilbert, 3 Johns. 528; Lattimore v. Harsen, 14 Johns. 330; Dearborn v. Cross, 7 Wend. 48; Ballou v. Walker, 3 Johns. Ch. 60.)

Plaintiff urged that the contract relied upon by the defendant.



was invalid because it was unsealed, was without new consideration, and was made after breach and an actual indebtedness had accrued. It is certain that an unexecuted parol agreement to rescind, if a *nude pact*, can not be enforced; but if executed, courts will not inquire into the consideration nor disturb the condition in which parties have voluntarily placed themselves. It is also true that a present indebtedness can in general only be discharged by payment, accord and satisfaction, or release under seal; yet when a contract of sale is actually rescinded, the restoration and acceptance of the property should be held to satisfy the obligation for the purchase money. If the vendor agrees to take back what he has sold, and cancel the debt, it is an accord; and if he actually takes it back, it is a satisfaction. But there is a broad distinction in this regard between an executed and executory agreement. While an executory parol agreement, without new consideration, can not be enforced, yet if the agreement be executed the act is a bar. Thus, while a mere verbal promise, after breach, to cancel a contract of sale would be no defense to an action upon it, yet if the contract be actually canceled and the property surrendered, it is at an end, and the formality of a sealed release is wholly unnecessary. The effect of such executed agreement is the same whether the contract be sealed or otherwise. The obligation, though it has become a subsisting debt, is discharged by the acts rather than agreement of the parties. It is not always essential that the instrument be surrendered to be canceled, though if done it is the strongest evidence of the fact of rescission. Reasons may exist why it is not done at the time, yet if the contract remains in possession of the parties as before, with no reason why it is not delivered up or canceled upon its face, and especially if no change of possession takes place in regard to the property, it is a circumstance that would weigh strongly with the jury against the claim of rescission in fact.

The effect of an unexecuted parol agreement to rescind a sealed contract for the sale of land, founded upon a new consideration, has been often discussed, and the decisions do not seem to be quite uniform. The tendency, however, is to validate such

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agreements, and thus so far to abolish the distinctions between sealed and unsealed written instruments. (See Sugd. on Vendors, § 9, and notes; Boyer v. McCulloch, 3 Watts & S. 429; Stevens v. Cooper, 1 Johns. Ch. 430.) This defense is usually made to bills for specific performance which are an appeal to the conscience and discretion of the chancellor, and it may come to be regarded as an equitable defense to an action upon the specialty. But though counsel make the point in their brief, it can not arise in this case without proof of consideration for the parol agreement, which I have failed to find in the record.

The error of the Circuit Court was not in refusing the plaintiff's instructions because he asked too much, nor in overruling his objections to testimony, for it was competent as far as it went; but in the instructions, given at the instance of the defendant, that a verbal agreement merely to rescind, without new consideration, was sufficient to discharge him. There should have been something more. The sale must have been actually abandoned by both parties, and the property, as far as possible, restored to the vendor; or, at least, if the agreement was unexecuted, it must have been founded upon a new consideration and clearly proved.

The judgment is reversed and the cause remanded. The other judges concur.

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JESSE WILSON, Appellant, v. JOHN T. MURPHY *et al.*, Respondents.

1. *Bills and notes, action on—Averments as to title—Pre-existing indebtedness—Manner of acquiring ownership—Allegation as to, immaterial.*—In a suit on a promissory note, the petition alleged that the payer transferred the note to plaintiff "for a valuable consideration to the payee in hand paid." *Held*, that proof showing the note to have been sold plaintiff in satisfaction of a pre-existing debt, sufficiently sustained the averment of the petition in regard to title. Under such averment the only material fact to be established was that of ownership; and the manner of acquiring it, whether by purchase with cash or other property, or by a discharge of pre-existing indebtedness, is of no importance.

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2. *Bills and notes, suits on — Pendency of attachment suit wherein defendant was garnishee, no defense, when.*—In a suit on a note by the assignee of the payee against the makers, the pendency of an attachment suit against the payee, wherein the makers were sued as garnishees, would constitute no defense if the assignment was in fact made before the garnishment. The pendency of the attachment might be pleaded in bar, provided the defense alleged that the note sued on was, *e. g.*, in fact still the property of the attachment debtor, and not simply charged by the creditor as his property. The garnishee may protect himself from liability to double payment by conforming to the requirements of the statute. (Wagn. Stat. 668, §§ 25-6.)

*Appeal from Fifth District Court.*

*Hall & Oliver*, for appellant.

*McFerran & Collier*, for respondents.

BLISS, Judge, delivered the opinion of the court.

The plaintiff sues upon a promissory note executed by defendants to one Perry K. Wilson, who sells and delivers the same to him. The petition states that the payee "sold and transferred by delivery said note to plaintiff for a valuable consideration to the said Perry K. Wilson in hand paid by plaintiff;" and defendant denies that said payee "sold and transferred by delivery said note for a valuable consideration to the said Perry K. Wilson in hand paid by the plaintiff, as stated in said petition." The evidence shows that the note was sold to the plaintiff and received by him in satisfaction of a debt due him by the payee; and the defendants claim that the evidence fails to sustain the averment of the petition in regard to the title. It is plain that the petition should show the authority of the plaintiff to bring his suit; and when he does not sue as payee, he must show his title to the note. But in this case he has averred more than is necessary; for it does not matter whether the consideration for the sale of the instrument be paid in hand or otherwise, and he may bring the suit upon it, even though he do not hold it as absolute owner. The issue, then, made by the answer is an immaterial one, for the right of the plaintiff to sue in his own name is not denied by it. It does not deny the title, but only the manner of acquiring it, which is of no importance; and even if the issue had been fairly

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made, it would only have been necessary to establish the material fact of ownership—whether by purchase with cash in hand, with other property, or by a discharge of a pre-existing indebtedness.

The defendants also set up as a defense, proceedings in attachment by Isaac K. Murphy against said Perry K. Wilson, the payee of the note, in which they were garnisheed as its makers, and show that such proceedings are pending and undetermined, and ask that the proceedings in this cause be postponed until the determination of the attachment suit. This part of the answer was, at the instance of the plaintiff, stricken out, and judgment was rendered for him, which was reversed in the District Court.

It has been long settled in Missouri that a recovery, by an attaching creditor, of the amount supposed to be due his debtor, by a garnishee, is no defense to an action by an assignee of such debtor against such garnishee, if the assignment be in fact made before the service of the garnishment. The original attachment suit is *res inter alios acta*, and can not conclude the rights of those who are not parties; nor is the assignee under obligation, unless notified under section 25, p. 668, Wagner's Statutes, to come in and interplead. (*Gates v. Kirby*, 13 Mo. 157; *Funkhouser v. How*, 24 Mo. 44; *Dickey v. Fox*, *id.* 217; *Dobbins v. Hyde*, 37 Mo. 114.) Nor can the pendency of a suit in attachment be pleaded in abatement. The plaintiff can not be compelled to suspend his action to await that of others. To thus hold would offer a bounty to collusion and fraud, and make the rights of the plaintiff depend upon the decision of a cause in which he was not a party; and besides, what would be the use of a delay when a final judgment against a garnishee would not protect him against a liability to the assignee? A pending suit in attachment might doubtless be pleaded in bar, provided facts were set forth, in addition, sufficient to constitute a bar—as that the note was in fact still the property of the attachment debtor, and not simply charged by the creditor as his property. (*Davis v. Paulette*, 3 Wis. 300; *Mason v. Norman*, 7 Wis. 609.)

There is no danger that the garnishee will be compelled to pay his liability more than once. Our statute makes ample provisions (*Wagn. Stat.* 668, §§ 25-6) for his protection; and if he

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neglects to avail himself of those provisions while the attachment proceedings are pending, it is no hardship to compel him to defend himself upon the merits in a suit by a claimant who has not been made a party to those proceedings. It is unnecessary to consider the instructions to the jury and the various rulings of the court which appear in the record, as they were but different modes of raising the same questions.

The action of the Circuit Court was substantially correct, and the judgment of the District Court is reversed. The other judges concur.

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JOHN M. BROWN, Respondent, v. JAMES K. BROWN, Appellant.

1. *Ejectment—Proof of sheriff's deed proper under general issue.*—In a suit in ejectment, the deed of a sheriff conveying the property in controversy to defendant, under a judicial sale, is admissible in evidence as well under the general issue, as showing a defect of title in the plaintiff, as under special averments.
2. *Ejectment—Title from common source—Title by defendant at sale under judgment against plaintiff—Prima facie case for plaintiff—Rebutted, how.*—It is an established principle that in ejectment suits, where both litigants claim title through the same third party, it is sufficient for the plaintiff to deduce title from the common source; and when defendant claims through purchase at sheriff's sale of the property, under judgment of another against plaintiff, he thereby admits the validity of plaintiff's title up to the date of the sale, and concedes a *prima facie* case to plaintiff; and the burden of proof devolves upon him to overcome it by showing that plaintiff's title has vested in himself, or come to a determination in some other way.

*Appeal from Fifth District Court.*

*Asper, Pollard & Richardson*, for appellant.

The court erred in refusing to give judgment for defendant, he having the superior possession, as well as having shown, by his sheriff's deed, *prima facie* title. It was only necessary for defendant to offer his deed, and the law did not require him to make proof of a judgment. The plaintiff could only overcome this by affirmative evidence, which was not done. (2 Greenl. Ev., § 306; Merchants' Bank v. Harrison, 39 Mo. 433; Knowlton v. Smith, 36 Mo. 307.)

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*McFerran & Collier*, for respondent.

The appellant, in his answer, claimed title by purchase at sheriff's sale on execution against the respondent; and thus claiming title from and through the respondent, he is estopped from denying respondent's title prior to and at the time of the purchase. (39 Mo. 433; 9 Mo. 173; 6 Mo. 106; Adams on Eject. 32, and note 77.)

CURRIER, Judge, delivered the opinion of the court.

This is an ejectment suit brought to recover possession of a farm in Daviess county of some three hundred and eighty acres, formed from parts of sections twelve and thirteen, township forty-nine.

The plaintiff deduces title from his deceased brother, William P. Brown, under a purchase from the latter's administrator in October, 1855, for the consideration of \$2,025. The case shows that the plaintiff, soon after the purchase, went into possession, and thenceforward continued to hold and enjoy the property as the owner until March, 1864, when the defendant, in the plaintiff's absence in California, got into possession, and now claims to hold the estate under a title alleged to have been acquired from the plaintiff himself through a judicial sale.

The defendant, by his answer, disclaims as to forty acres, pleads the general issue as to part, and sets up title in himself as to the residue under the alleged judicial sale. The plaintiff recovered judgment in the Circuit Court for all but the forty acres. The judgment was affirmed in the District Court, and the defendant brings the case here by appeal. At the trial in the Circuit Court, the defendant, in support of the issue on his part, read in evidence a deed executed by the sheriff of Daviess county, November 4, 1863, which purports to convey to him all the plaintiff's right, title, and interest in and to the farm in question, except the disclaimed forty acres, for the consideration of \$280. The deed recites a judgment rendered by the Probate Court of Daviess county, in favor of one Joab Woodruff, against the plaintiff and one Oxford. The sale and conveyance were



made in virtue of an execution issued upon this judgment, which thus constituted the foundation of the proceeding. The defendant also gave evidence tending to show that he took possession under the sheriff's deed, and that he thenceforward claimed the property as his in virtue thereof. The case has been confused by the form of the answer, which seems to contemplate a line of defense different from that actually made at the trial. At the trial the sheriff's deed was employed to defeat the whole action, although it was alleged in the answer as a defense to only a portion of the premises in controversy.

The deed, however, was admissible in evidence as well under the general issue, as showing defect of title in the plaintiff, as under the special averments. The case stands, therefore, as regards the pleadings, as though the defendant had pleaded the deed and the title supposed to have been acquired under it as a defense to the entire action; or, omitting this, had rested his defense solely upon the general issue. And this seems to have been the view taken by the defendant's counsel; for it is insisted that the sheriff's deed cut up the plaintiff's case, root and branch, destroying the entire cause of action. One point made by the defendant in this court is thus expressed: "The court (below) erred in rendering judgment for the plaintiff, and not for the defendant, after the defendant had introduced the sheriff's deed for the same land—the plaintiff not having introduced any evidence to rebut the *prima facie* case established thereby for the defendant." It is thus clear that the sheriff's deed was relied upon as a defense to the entire action, and not as a defense to a part of it merely. In other words, the defendant claimed title through the plaintiff to the whole subject-matter of the litigation, founding himself upon the sheriff's deed. The defendant thus stands claiming title through and from the plaintiff, and rests upon that title as a ground of defense covering the whole case except the disclaimed forty acres, and thus admits his antagonist's title at the date of the sheriff's deed. There is, therefore, no necessity of inquiring into the state of the plaintiff's paper title antecedently to the sheriff's sale.

It is an established principle that where both litigants claim

title through the same third party, it is sufficient for the plaintiff in an ejectment suit to deduce title from him who is the common source of title. (2 Greenl. Ev., § 307; Adams on Eject., by Tillinghast, p. 248; Merchants' Bank v. Harrison, 39 Mo. 433.) In the case at bar the plaintiff is the common source of title, since the defendant claims through him, and, thus claiming, necessarily admits the title of the party from whom he attempts to deduce title. Even an agreement to purchase, deliberately made, has been held to have the same effect, estopping the bargainee from disputing the bargainor's title. (1 Wend. 418; 7 Cow. 637.) Nor is this all. It seems that any act of acknowledgment, amounting to an admission of title in the plaintiff, concedes to him a *prima facie* case, and devolves upon the opposite party the burden of overcoming it by means proper to that end, as by showing that the plaintiff's title has vested in the defendant, or come to a termination in some other way. (2 Greenl. Ev., § 305; 11 Moore, 394.) In the case before us the defendant attempted to show that the plaintiff's title to the disputed premises had come to a termination, and had passed to and vested in the defendant, through the medium of the sheriff's deed. The deed was read in evidence by the defendant without objection, but the court refused to instruct as to its effect, as the defendant desired.

The defendant's fifth and sixth instructions direct the jury, for substance, to find for the defendant — the fifth as to all the land, and the sixth as to all but sixty acres. These instructions were refused by the court, and properly. They are based upon two assumptions of law and one of fact: 1. That no *prima facie* case was made for the plaintiff. This point has already been sufficiently considered. So much was admitted by the character of the defense. 2. That the sheriff's deed operated, *prima facie*, to vest the plaintiff's title in the defendant. 3. That there was no evidence from which the jury was authorized to find facts invalidating the deed. This assumption was unwarranted.

It appears from the record that evidence was submitted to the jury tending to show that Oxford, one of the joint defendants in the judgment recited in the sheriff's deed, and upon which

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the validity of the deed depended, was dead at the time the judgment was rendered. It also further appears that evidence was given tending to show that the present plaintiff, who was the other defendant in that proceeding, was at the time absent in California, and that he was never served with process or otherwise notified of the pendency of the suit.

In a word, there was evidence tending to show that the judgment was rendered without jurisdiction or authority. The weight of this testimony was properly left to the consideration of the jury. In the argument no effort was made to defend these instructions on this third ground, and it is not necessary to pursue the subject further. The whole labor of the argument in behalf of the defendant was directed to the supposed insufficiency of the plaintiff's paper title—a point rendered immaterial, as we have seen, by the character of the defense itself, since it deduced the defendant's supposed title from the plaintiff.

I discover, upon a review of the whole case, no sufficient reason for disturbing the judgment of the court below, as being either against the law or the evident justice of the case. I am, therefore, of the opinion that the judgment ought to be affirmed. The other judges concur.

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JOANNA MEYERS *et al.*, Defendants in Error, v. ORIN H. GALE,  
Plaintiff in Error.

1. *Husband and wife—Married women, act of 1865 concerning—Separate property of wife, acquired before act, not exempt under execution against husband.*—Under the act as to rights of married women (Gen. Stat. 1865, p. 464, § 14) there is no exemption of the interest of the husband in his wife's real estate, acquired in virtue of the marriage, from seizure and sale in satisfaction of his separate debts contracted after marriage and after the acquisition of her estate, when such indebtedness accrued and such real estate was acquired prior to that act becoming law. In its operation it acts only prospectively. Exemption acts of such character do not impair the pre-existing rights of creditors.
2. *Ejectment—Sheriff's deed of plaintiff's property may be shown under general issue.*—In an action in ejectment, defendant may, under the general issue, show title in himself to the property by proof of judgment and execution against plaintiff, and purchase of the property in controversy by himself at sheriff's sale.

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*Error to Fifth District Court.*

*Broadbus & Mansur*, for plaintiff in error.

I. It was not necessary for appellant to plead his title. He could avail himself of it under the general issue. (*Carter v. Scaggs*, 38 Mo. 302; *McCormick v. Fitzmorris*, 39 Mo. 35.)

II. Section 14, chapter 115, Gen. Stat. 1865, can not have a retroactive operation, so as to bar existing debts at the time of its going into operation. (*Cunningham v. Gray*, 20 Mo. 170; *Barbee v. Wimer*, 27 Mo. 140; 26 Mo. 219.)

III. The court below erred in refusing to admit the sheriff's deed. (*McCormick v. Fitzmorris*, 39 Mo. 24; *Carpenter v. King*, 42 Mo. 219.)

*McFerran, Packer, Turner, and Mansur*, for defendants in error.

CURRIER, Judge, delivered the opinion of the court.

This is an action of ejectment brought to recover the possession of certain premises described in the petition. The answer put in issue the facts alleged by the plaintiffs as grounds for a recovery. At the trial—as showing title in the plaintiff, Joanna Meyers, the wife of Silas Meyers, the other plaintiff—among other documents, the plaintiffs read in evidence a deed from one Bell and wife to said Joanna, dated April 28, 1866, and conveying to her the premises sued for. On the part of the defense, it was sought to be shown that the title thus acquired by Mrs. Meyers had passed to and vested in the defendant to the extent of her husband's interest therein. For that purpose the defendant offered in evidence a sheriff's deed, which purported to convey to him all of Silas Meyers' right, title, and interest in and to the premises in question. This deed recited a judgment recovered against Meyers in September, 1866, and two judgments recovered against him in December, 1867; that executions were duly issued and levied; and that the premises were subsequently advertised and sold in conformity to law, the defendant becoming the purchaser at the execution sale. The defendant also offered to

show when the indebtedness, which had become merged in the judgments, in fact accrued; but the evidence was objected to by the plaintiffs and ruled out by the court, as was also the sheriff's deed. This action of the court is complained of as erroneous.

The case raises the general question whether the act in relation to the rights of married women (Gen. Stat. 1865, p. 464, § 14) exempts from seizure and sale, in satisfaction of the separate debts of the husband, his interest in his wife's real estate acquired in virtue of the marriage, when such indebtedness accrued and such estate was acquired prior to that act becoming a law. The court below assumed the affirmative of this proposition to be true, and therefore excluded the sheriff's deed and the other evidence offered in support of it. The exclusion of this evidence rests upon a mistaken view of the law. The statute invoked by the plaintiffs does not have the effect attributed to it. In its operation it has reference to the future, and acts prospectively. It was not intended to react upon a past condition of things, so as to impair the rights of creditors as they existed at the time the enactment went into operation. So the court decided in *Cunningham v. Gray*, 20 Mo. 170, in construing and passing upon an act of the same character as that now under review. The principle of that decision is decisive of the present case as regards the particular question under consideration, and it has since been repeatedly recognized as well founded. (See 20 Mo. 277; 26 Mo. 219; 27 Mo. 140.) It may therefore be regarded as the settled doctrine in this State that exemption acts, like that relied upon by the plaintiffs, do not impair the pre-existing rights of creditors.

It follows from this that if Meyer's indebtedness, which was merged in the judgments, accrued prior to the time when the enactment in relation to the rights of married women went into operation, his interest in the premises sued for is not protected from seizure by his creditors under the provisions of that statute. But it does not appear when the indebtedness against Meyers in fact accrued. The court improperly excluded the defendant's testimony on that subject. The judgments did not show when the indebtedness originated. It must have been prior to their rendi-

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tion, and the defendant should have been permitted to show when—whether before or after the exemption act took effect.

It is not claimed by the plaintiffs that the outstanding debts against Meyers were contracted prior to their intermarriage, or prior to the acquisition of the property by Mrs. Meyers, so as to exempt it from seizure under the first section of the act of 1855. (R. C. 1855, p. 754, § 1.) It is suggested, however, that the debts may have been contracted by Meyers as a security, and that the property would therefore be exempt under the provisions of the third section of that act. If the plaintiffs would avail themselves of this section, they must make a case within its provisions. The burden of proof is on them to show affirmatively that the debts were contracted by Meyers as a security; not on the opposite party to show negatively that they were not so contracted.

But it is further insisted by the plaintiffs' counsel that the defendant could not defeat the action by showing title in himself, since he had alleged no such specific ground of defense in his answer. This point is unavailing. The form of the answer constituted no obstacle in the way of making that defense. The sheriff's deed and the other excluded evidence was admissible under the general issue. (Carter v. Scaggs, 38 Mo. 302; and see Brown v. Brown, *ante*, p. 412.)

With the concurrence of the other judges, the judgment will be reversed and the cause remanded.

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WESTERN BANK OF MISSOURI, Respondent, v. ABNER L.  
GILSTRAP, Appellant.

1. *Corporations, attorneys at law may be employed by, without resolutions of the board of directors.*—Managing officers of corporations have power to employ attorneys and counselors without formal resolutions to that effect from their boards of directors.

*Appeal from Fourth District Court.*

*Eskridge, Ruby & Vories*, for respondent.

*Eberman, Gilstrap & Williams*, for appellant.



BLISS, Judge, delivered the opinion of the court.

The plaintiff brought suit to recover a balance due upon a stock note, and the defendant offset professional services in giving counsel upon amending a legislative act, under which the plaintiff's branch at Bloomington went into liquidation. Under the instruction to the jury, the offset was not allowed, and defendant appeals. The evidence shows that the president of the branch was out of the country; that there was no acting officer except the cashier; that the cashier employed defendant to perform the services. It also shows that the corporation met and availed themselves of the provisions of the act, though it nowhere appears that the matter of the employment of defendant was ever considered either by directors or stockholders. Upon the trial the court gave the following instruction: "That the law under which the plaintiff, as a corporation, had its existence, conferred upon Mr. Shortridge, whether as cashier or president, no authority to contract with defendant, Gilstrap, as alleged in his answer; and as a contract of that kind is wholly without the usual and ordinary duties devolving upon persons as cashier or president of a bank, incorporated such as plaintiff, unless defendants show some express authority given to Mr. Shortridge to make said contract, defendants can not recover, unless Mr. Shortridge's act became the act of plaintiff by some express ratification of the board of directors or stockholders." The record shows that, upon being requested to modify the term "express," in the instruction, so as to allow the jury to infer a ratification from the acts of the corporation, the judge said orally, in the presence of the jury, that "the authority must be by resolution of the board of directors or of the stockholders, to bind the plaintiff." This comment was irregular, but as it adds nothing to the terms of the instruction, the defendants were not injured by it. I do not find in the act of 1857, to regulate banks, etc. (Sess. Acts 1856-7, p. 14), under which this corporation was organized, any special provisions in regard to the duties of its directors or officers, and it must be governed by the general law.

"Corporations, like natural persons, are bound only by the

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acts and contracts of their agents, done and made within the scope of their authority." (Ang. & Ames on Corp., 8th ed., § 299, and see case cited in the notes.) No exhibit has been made of the by-laws of the plaintiff, and we are unadvised as to whether any special authority was given or withheld from the directors or officers. The evidence shows that a draft of an act necessary to wind up the concerns of the plaintiff was submitted to defendant by the cashier, then the only officer in the place, for his professional opinion upon it, and for such corrections as should make it answer its ends. The court, in the instruction quoted, held that this act of the cashier was wholly beyond his authority. In *American Insurance Company v. Oakley*, 9 Paige, 496, the authority of a solicitor to appear for the company was questioned, he having been employed by an attorney who had been authorized to act by letter from the president. The action of the attorney in employing the solicitor was sustained, the court remarking that if the president exceeded his authority the bank must look to him for damages. In commenting upon the case, the chancellor further remarks: "It is a matter of every day occurrence for the president and other head officers of corporations to employ and retain attorneys and counsel to prosecute or defend suits, or to assist in legal proceedings in which the corporation is interested. And I doubt whether it is usual for the members of the bar to take the precaution to inquire, when they are thus retained, whether there has been a formal resolution of the board of directors authorizing their retainer in the case."

*Mumford v. Hawkins*, president of the Exchange Bank, 5 Denio, 355, was an action by the plaintiff for a bill of fees in a suit instituted by defendant's bank, and the principal defense was that the action was unauthorized. In giving the opinion of the court, Beardsley, J., says: "In the absence of all proof to the contrary, we think it must be assumed that the president was duly authorized to institute and carry out that proceeding for the bank. There was nothing shown on the trial, to repel the presumption of such authority, but much to confirm it. \* \* The cashier, who was the principal financial officer, had, as was shown by his letter, employed or authorized the

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solicitor to carry on the chancery proceedings," etc. And it having been shown that the bank directors repudiated said suit and the proceedings therein, the judge further remarked that "the fact that the directors then refused to ratify what had been done by the president was not admissible evidence against this plaintiff."

From these authorities—and others might be given to the same effect—it is clear that the managing officers of a corporation have power to employ attorneys and counselors; so that the instruction complained of is erroneous in its very inception. If such officers transcend their powers, as limited by the particular corporation, they are responsible to their employers, but outsiders are not supposed to be advised of their limitations. It would be very strange if banks should be deprived of the power of employing attorneys except by calling a meeting of the board of directors, and by formal resolutions. Promptness is often required in instituting proceedings for the security of debts, and delays might be very damaging; and if the employment of attorneys, either to appear in suits or otherwise, in their legitimate business, should be held to be beyond the scope of the authority of the general officers of the bank, the bank itself would be much more likely to suffer than the persons employed. The nature of the employment, the character and value of the services, are all matters for the consideration of the jury under the evidence.

That the case may be again tried, we reverse the judgment and remand it to the Circuit Court; the other judges concurring.

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MARTIN C. BONNELL, Respondent, v. UNITED STATES EXPRESS COMPANY, Appellant.

1. *Questions of fact for the jury.*—Questions whether witnesses swear falsely, or what credit is to be attached to evidence, or how far it is contradictory, are solely for the jury in trials at law, and will not be considered in the Supreme Court.
2. *Appeals without merit—Damages.*—When appeals are without merit, ten per cent. damages may be awarded.

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*Appeal from Sixth District Court.**Vories, Gilbert & Merriman*, for appellant.*Doniphan*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an action upon an account for work and labor performed in shelling and sacking corn for the appellant by the respondent. It appears that respondent was employed to do the work by one Mathews, a local agent of the appellant, at Weston; and it is denied that Mathews had any authority to make the contract, and this is the only defense set up in the case. Whilst the labor was being performed Mathews left, and the respondent, to secure himself, held on to about two hundred sacks of the corn and locked it up in a warehouse. The superintendent of the appellant, who testifies that he was the only person who was empowered to buy and ship corn, then agreed with the respondent that if he would release and ship the corn he would pay him for his services. Respondent accordingly shipped the corn to the appellant, in compliance with directions. Here was a recognition of the services and a ratification of the transaction. As to whether any witness swore falsely, or what credit should be attached to certain evidence, or how contradictory some of it might have been, were all questions belonging to the jury, to be weighed and reconciled as best they could. All the instructions asked for by appellant were given, and those submitted by respondent and given by the court were entirely unobjectionable. The jury, with all the evidence before them, and acting under proper declarations of law, found for respondent, and no case is made out showing that the finding was erroneous.

This appeal should never have been taken, and the judgment will be affirmed, with ten per cent. damages; the other judges concurring.

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Hamilton et al. v. McClelland et al.

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T. HAMILTON *et al.*, Respondents, *v.* N. M. McCLELLAND *et al.*,  
Appellants.

1. *Equity—Attachment—Innocent purchaser for value, etc.—Cloud on title, bill in equity for removal of.*—Under an attachment issued from one county, certain land was seized in another; but there was no record evidence in the latter county either of its issue or of any proceedings under it. Prior to the levy it had been conveyed away by defendant, and passed through two or three hands. Subsequent to the attachment it was purchased by a third party, who, after payment of the purchase money, and at the delivery of the deed, for the first time got notice of the attachment. Judgment being had on the attachment, the land was sold under execution, and bought in by plaintiff, the attaching creditor. Plaintiff in the attachment afterward brought his bill in equity against the purchaser to remove the cloud on the title acquired by his purchase under the execution. *Held*, that the bill contained no equity, and should be dismissed.

*Appeal from Fifth District Court.*

*Hall & Oliver*, for appellants.

I. Gregg, being an innocent purchaser for value without notice, had a right to go on and acquire the legal title. (2 Lead. Cas. in Eq., part 1, p. 36 *et seq.*; *id.* 57.)

II. A court of equity will not even assist a party who has fortified himself with the legal estate against a *bona fide* purchaser. (2 Lead. Cas. in Eq., part 1, p. 38; *id.* 81 *et seq.*)

III. The levy of the attachment in this case was not notice to Gregg of plaintiffs' claim. (18 Johns. 503; 13 Johns. 470.)

*Dunn & Orrick*, and *H. M. & A. H. Vories*, for respondents.

I. The attachment and its levy upon the land in controversy being made in conformity to law, created a lien on the land in favor of the respondents, which could not be divested by purchasers of the land, either innocent or otherwise, during the pendency of the suit. (Drake on Attach., §§ 224-242; 23 Mo. 94; 1 Litt. 302; 5 Dana, 76; 9 Dana, 18; 5 Moore, 73; Drake on Attach. 232.)

II. The pending of the suit in this case gave notice to the inhabitants of the State that this land was still claimed to belong

to McClelland, for the payment of his debts, and all persons are as much bound by this notice as if they had actual notice of the fraud. The doctrine of *lis pendens* is peculiarly applicable to this case. (1 Sto. Eq., §§ 405-6.)

BLISS, Judge, delivered the opinion of the court.

The plaintiffs presented their petition in equity to the Circuit Court of Carroll county to remove a cloud upon their title to land purchased under the following circumstances: T. Hamilton and the ancestor of his co-plaintiff, in March, 1862, sued out of the Ray Circuit Court a writ of attachment against defendant McClelland, attached the land in controversy, and in June, 1865, obtained judgment, sold and bid in the property. Previous to the levy in attachment it had been conveyed away by McClelland, and passed through two or three hands, when subsequent to the attachment it was purchased by defendant Gregg. It is clear from the evidence that he was a *bona fide* and innocent purchaser without actual notice and for a good consideration. The attachment issued from Ray county, and the land seized lies in Carroll county, and there was no record evidence in the latter county either of its issue or of any proceedings under it—there being then no law requiring an abstract of attachment proceedings to be filed with the county recorder. Before the purchase, Gregg made a thorough examination of the records of the proper county, and paid twelve hundred dollars of the purchase money down, and gave his notes for the balance. After some delay the deed was forwarded to his attorney, and when delivered to him he was informed by the attorney that he had just heard of these attachment proceedings, which was the first information he had received upon the subject. Under these circumstances defendant Gregg claims that he should be protected as an innocent purchaser, but the Circuit Court rendered a judgment against him canceling his deed, which judgment was affirmed in the District Court.

The defendant has raised some questions concerning the regularity of the proceedings in attachment, and claims that his legal



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as well as equitable rights are superior to those of the attaching creditor. But it is unnecessary, at this time, to pass upon these questions. There is no equity in the case at bar as against Gregg, and every principle of chancery proceedings would be ignored if we were to allow the judgment below to stand. It is true that people sometimes suffer from their ignorance, even where all available means have been used to arrive at the truth; and in the present case, if it should appear in a proper proceeding that the attachment creditor has complied in prosecuting his suit with the requirements of the law—that the lien attached before the purchase by Gregg, and was not interrupted by any subsequent irregularity—the mere fact of an innocent purchase might not prevail. But equity will never lend its aid to invalidate such purchase. This is a proceeding to set aside the conveyance to Gregg, is altogether equitable in its character, and is addressed to the conscience of the court. While we might not interfere to protect him, we certainly are not called upon to place him in a worse condition than the one in which he has unwittingly placed himself; we are not called upon, as against him, to give greater force and effect to the attachment proceedings than they would have at law. Whatever title Gregg acquired should be left intact to protect him, if possible, against these proceedings. (Upon this subject, see authorities cited in notes to Bassett v. Nosworthy, in 2 Lead. Cas. in Eq., pt. 1, p. 2.)

Our view of the equity of the case renders it unnecessary to consider the various other points made by the record; and the other judges concurring, the judgment will be reversed and the petition dismissed.

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JOHN BRADFORD, Plaintiff in Error, v. HENRY RUDOLPH,  
Defendant in Error

1. *Practice, civil—Weight of evidence, verdict of jury considered as to.*—In trials at law, juries are the proper judges as to the weight of evidence, and their verdicts on that issue are conclusive on the Supreme Court.

*Error to Fifth District Court.*

*McFerran & Broaddus*, for plaintiff in error.

*Dixon*, for defendant in error.

WAGNER, Judge, delivered the opinion of the court.

This action was brought by the plaintiff for goods sold and delivered.

Defendant's answer stated that the goods were purchased of plaintiff's agent, and that if, when received, they were not such as represented by the agent, he (defendant) was to have the privilege of reshipping and sending them back to plaintiff; that when the goods were received they did not satisfy the terms of the agreement, and he accordingly sent them back to plaintiff. To this answer there was a replication.

The cause was tried before a jury, and there was a verdict for defendant, upon which judgment was rendered, which judgment was affirmed in the District Court.

The whole merits of the question turned upon issues of facts, and the jury were the proper judges of the evidence, and their verdict is conclusive upon us. The instructions, taken as a whole, were good enough, and fairly presented the case.

Judgment affirmed. The other judges concur.

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JOHN T. MURPHY and GEORGE W. MURPHY, Plaintiffs in  
Error, v. PERRY K. WILSON, Defendant in Error.

1. *Attachment—Garnishment—Production of note—Construction of statute.*—Section 26 of the statute touching garnishment (Wagn. Stat. 668) does not contemplate an original proceeding to compel defendant to file in court a promissory note theretofore executed by plaintiff to defendant, although proceedings in attachment had been commenced by a third party against defendant, wherein plaintiff had been summoned as garnishee. The statute only aims to give the garnishee in a pending action an opportunity to protect himself by compelling the attachment debtor to produce the note in controversy, or show a sale or transfer if one had been made.

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Kelly v. The United States Express Co.

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*Error to Fifth District Court.*

*McFerran*, for plaintiffs in error.

*Hall & Oliver*, for defendant in error.

BLISS, Judge, delivered the opinion of the court.

The plaintiffs instituted an original proceeding in the Circuit Court of Livingston county, under section 26, page 668, of Wagner's Statutes, to compel defendant to file in court a promissory note theretofore executed by them to said defendant. Proceedings in attachment had been instituted against said defendant by one Isaac T. Murphy, in which the plaintiffs were garnisheed as the makers of the note, and the attachment suit had been prosecuted to final judgment and appealed to the District Court. The petition for the order sought in this proceeding was addressed to the judge in vacation, and a conditional or alternative order issued, of which the defendant, being a non-resident of the State, was notified by publication. Upon hearing at the proper term, the motion for a peremptory order was overruled and the matter dismissed, and the action of the court in the premises was affirmed in the District Court. The action of the court was clearly right. The statute does not contemplate an original proceeding, but only aims to give the garnishee in a pending action an opportunity to protect himself by compelling the attachment debtor to produce the note in controversy, or show a sale and transfer if one has been had.

Judgment affirmed. The other judges concur.

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JOHN KELLY, Respondent, *v.* THE UNITED STATES EXPRESS COMPANY, Appellant.

1. *Question of credibility for jury.*—The jury are the sole judges of the credibility of witnesses.
2. *Damages.*—On appeals without merit, ten per cent. damages may be awarded.

*Appeal from Fifth District Court.*

*Doniphan*, for respondent.

*Vories & Merryman*, for appellant.

WAGNER, Judge, delivered the opinion of the court.

This case does not differ in any essential particular from the case of Bonnell against the same defendant, *ante*, p. 422. The cause was tried before a jury, and the facts are mainly the same; the jury found for respondent, and judgment was rendered on the verdict. All the instructions asked by the appellant were given by the court, and were as favorable as could have been desired. They told the jury that they are the sole judges of the credibility of the witnesses, and if they believe any witness has sworn falsely in any particular, they may entirely disregard his whole testimony. The first instruction says that unless the jury believe from the evidence that the defendant employed plaintiff to perform the services set forth in the petition, or subsequently ratified the employment and received the benefit of it, and promised to pay for it, they should find for the defendant. The whole case was thus left fairly and correctly to the jury.

The judgment will be affirmed, with ten per cent. damages; the other judges concurring.

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STATE OF MISSOURI, Respondent, *v.* MOSES HIRSCH, Appellant.

1. *Crimes and punishments—Indictment—Peddlers' goods, etc., not the produce of this State—Burden of proof.*—In an indictment brought under the act concerning peddlers (Wagn. Stat. 979, § 1), the proof not being peculiarly within the knowledge of defendant, it devolves upon the State, in order to insure conviction, to prove that the goods, wares, and merchandise sold were not the growth, produce, or manufacture of this State. In such case full and plenary proof is not required, but sufficient to make out a *prima facie* case will be necessary.

*Appeal from Fourth District Court.*

*C. D. Burgess*, for appellant, cited 1 Greenl. Ev., § 78; Commonwealth v. Isaac Samuel, 2 Pick. 103; Rex v. Rogers, 2 Campb. 654.

*Johnson & Boardman*, for respondent.

The averment that the goods sold were not the growth, produce, or manufacture of this State is peculiarly within the knowledge of the accused, and should be established by him in his defense. (1 Am. Crim. Law, §§ 614-15, 6th ed.; State v. McGlynn, 34 N. H. 422.)

WAGNER, Judge, delivered the opinion of the court.

The appellant was indicted under the first section of the statute concerning peddlers, for selling goods, wares, and merchandise not the growth, produce, or manufacture of this State, without license. (2 Wagn. Stat. 979, § 1.) On the trial, the prosecution gave evidence proving the acts of selling and going from place to place, but no evidence was introduced to establish the character of the goods sold. The trial was before the court without a jury; and the appellant asked an instruction that, before the court could find him guilty, it must believe from the evidence that he dealt as a peddler without license, in selling goods, wares, and merchandise which were not the growth, produce, or manufacture of this State. This instruction the court refused to give, and then found the defendant guilty, and entered up judgment, assessing a fine against him, which judgment the District Court affirmed. The only question is on which side was the burden of proof cast. The general rule is familiar to all, that the burden of proof is on the party holding the affirmative; but to this rule there are some exceptions. Thus, in an indictment for keeping a ferry and ferrying people without license, or a dram-shop, and selling liquor without license, it is incumbent on the defendant to show that he is licensed. (Wheat v. State, 6 Mo. 455; Schmidt v. State, 14 Mo. 137.) In these cases the acts are in themselves unlawful, and the proof lies peculiarly

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within the knowledge of the defendants, and is easily producible by them. But in other cases, where it requires the application of extrinsic evidence to make out the case, the averment, although negative, should be accompanied with at least *prima facie* proof. It has been so held in cases of prosecutions for penalties, given by statutes, for coursing deer in inclosed grounds, not having the consent of the owner (Rex v. Rogers, 2 Campb. 654; Rex v. Jarris, 1 East. 643, note); or for cutting trees on lands not the party's own; or taking other property, not having the consent of the owner (Little v. Thompson, 2 Greenl. 128; Rex v. Hazy et al., 2 C. & P. 458); or for selling, as a peddler, goods not of the produce or manufacture of the country (Commonwealth v. Samuel, 2 Pick. 103). In these and the like cases, full and plenary proof on the part of the affirmant could hardly be expected; but still it would be necessary for the party alleging the violation, and seeking the benefits or the penalties of the statute, to make out a *prima facie* case by some accompanying evidence of the fact constituting the offense. I think, therefore, the instruction should have been given; and because the same was refused, the judgment will be reversed and the cause remanded.

Reversed and remanded. The other judges concur.

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JOHN GRIMES, Appellant, v. WILLIAM RUSSELL et al.,  
Respondents.

1. *Equity — Conveyances to hinder and delay creditors — Solvency of grantor, etc.* — In a suit in equity against a father and son to set aside a conveyance made by the former to the latter, the proof showed that at the time of the conveyance, in 1852, and long afterward, the father was in good circumstances and abundantly able to meet all his current liabilities. The testimony of certain witnesses having no personal interest in the matter, and given many years after the occurrence, showed that the father had said that the conveyance was made to defeat the collection of a security debt of fifty dollars, of the existence of which the only proof was his own statement. He testified that he paid the debt before judgment; that at the time of the purchase he had no recollection of its existence. *Held*, that the evidence showed no such fraud as to invalidate the deed.



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Grimes v. Russell et al.

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*Error to Fifth District Court.*

*Vories, Dunn & Orrick*, for appellant.

*Donaldson, Bannister & Hughes*, for respondents.

CURRIER, Judge, delivered the opinion of the court.

This is a proceeding in equity to set aside a deed, and for judgment vesting in the plaintiff the title to lands thereby conveyed. The petition avers that the defendant, William Russell, in April, 1852, purchased forty acres of land situated in Ray county, Missouri; that the purchase money was paid from his own means and resources, but that he caused the title to be vested in his minor son, Elijah B. Russell, the other defendant in this suit, for the purpose of defrauding his creditors. The answer denies the fraud, and sets out the facts which induced the conveyance to the son, as the defendants now claim.

The case presents but a single question for consideration, and that is a question of fact—namely, whether the evidence preserved in the record shows the existence of the fraud alleged in the petition. As this is a chancery proceeding, the duty is devolved upon this court of examining the evidence and determining from it the issue of fact raised by the pleadings.

In 1850 William Russell went to California. Prior to leaving, as the evidence tends to show, he promised his son some suitable reward in case the son, during the father's absence, should remain at home and do well. It appears that Russell, the father, was absent some two years, returning to his home in Missouri in 1852, and bringing with him funds more than sufficient to pay off all debts that had accumulated against him in his absence, and that such liabilities were all promptly met. Soon after his return the forty acres of land were purchased and conveyed to the son, as in fulfillment of the father's previous pledge, as the defendants insist, but with a view to defraud his creditors, as the plaintiff alleges in his petition. The land was subsequently assessed to the son for the purposes of taxation for some seven consecutive years. The testimony abundantly shows that

Russell, the father, was at the time in good credit every way, punctual in the payment of his debts, and possessed of more or less personal property, such as horses, cattle, sheep, hogs, etc. He was also understood to be the owner of real estate. He testifies that soon after the forty acres were purchased in the name of his son, he also purchased one hundred and sixty acres in his own name, and as to this he is not contradicted. He appears, from the testimony, to have remained in good pecuniary credit and standing for the next succeeding ten years, and until difficulties sprung up between him and the present plaintiff in 1862.

Such is the drift of the testimony, and the only evidence in conflict with it is gathered from the statements of William Russell, made many years ago, to the effect, as remembered and testified to by several witnesses, that the title to the forty acre lot was vested in Elijah B. Russell, the minor son, in order to defeat the collection of a security debt of fifty dollars—a debt not shown to have had any existence, except as the facts appear in the testimony of William Russell himself, who testified that, having heard in California that this debt had been paid by the party primarily liable, the subject had passed from his recollection at the time of the purchase; but that he subsequently settled the claim, not being able to show the fact of a prior payment. He further testified that he was not aware of owing a debt to any one at the time of the purchase, nor is there any evidence tending to show that there were then any outstanding liabilities against him whatever, except this fifty dollar claim, or that he subsequently contracted any indebtedness till years later.

The plaintiff's case rests upon the sole ground of a supposed fraudulent intent on the part of William Russell to evade his liability to the creditor holding the fifty dollar claim, which Russell settled without even permitting it to go into judgment. The transaction is of some seventeen years' standing, and the evidence of the alleged fraud rests in the recollection of witnesses as to what William Russell said many years ago about a matter of no personal interest to the witnesses themselves. The liability to a misconception on their part of Russell's meaning, or a misrecollection of his words, is very great.

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In my opinion, the evidence is insufficient to warrant the judgment of the Common Pleas Court granting the prayer of the plaintiff's petition. I therefore recommend the affirmance of the judgment of the District Court reversing the judgment of the court below. The other judges concur.

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WM. H. H. SMITH, Defendant in Error, *v.* JAMES A. MEYERS  
*et al.*, Plaintiffs in Error.

1. *Forcible entry and detainer—Collusion between defendant and tenant of plaintiff—Testimony touching plaintiff's presence.*—When the petition in an action of forcible entry and detainer charged that defendant obtained possession through collusion with a tenant of plaintiff, proof negating the averment of collusion is competent, and its competency is in no way affected by the fact of plaintiff's presence or absence when defendant got possession.
2. *Forcible entry and detainer—Question of title not proper in action of.*—The question of title is in no way involved in an action of forcible entry and detainer.

*Error to Fifth District Court.*

It seems to have been contended on behalf of defendants in this case, among other things, that Reed entered the premises as tenant of the Hannibal & St. Joseph railroad, and afterward attorned to defendant, which attornment was void under section 15, Gen. Stat. 1865, p. 740. For further facts, see opinion of the court.

*Hall & Oliver*, and *Turner & Mansur*, for plaintiffs in error.

*Collier*, for defendant in error.

CURRIER, Judge, delivered the opinion of the court.

This proceeding was originally commenced before a justice of the peace, under the third section of the forcible entry and detainer act. The case having been appealed to the Circuit Court, the complaint, on payment of costs, and by agreement of the parties, was amended so as to bring it within the pro-

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visions of the act in relation to landlords and tenants. (Gen. Stat. 1865, ch. 187.) The amendment is objected to; but, having been made by consent, and the case having been tried upon the complaint as amended, it is now too late to raise the objection here. The complaint, as amended, alleges the plaintiff's right of possession of the premises sued for; that the plaintiff leased them to one Reed, in June, 1864, for the term of one year, ending the following June; that the defendants, in November, 1865 (Reed still remaining in possession under the plaintiff), obtained possession of the premises through collusion with Reed; and that they wrongfully held possession against the right of the plaintiff, although duly notified, in writing, to surrender possession, etc.

The plaintiff, at the trial, having given evidence tending to prove the averments of his complaint, the defendants, among other things, offered to show under what circumstances they took possession, and to give evidence tending to negative the averment of collusion with Reed. This evidence was objected to and excluded on the ground that the plaintiff was not present nor a party to the transaction proposed to be given in evidence.

The form of the question propounded to the witness, by which this testimony was sought to be elicited, was highly objectionable; but no objection was made on that account. The evidence was objected to and excluded solely on the ground mentioned above. This was error. The allegation of collusion was of unquestionable materiality. Any facts, therefore, that went to disprove it, it was the right of the defendants to employ in resisting the action, as it was also their right to use such facts in rebutting the case as made by the plaintiff. The competency of such proof was in no way affected by the fact of the plaintiff's presence or absence at the time and upon the occasion of the defendants' getting possession of the disputed premises. The complaint itself is framed upon the idea that this possession was acquired covinously, in the absence of the plaintiff and without his knowledge or consent, and by means of some collusion, contrivance, or arrangement with Reed. It was perfectly legitimate, therefore, for the defendants to repel these imputations by showing, if they

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could, that the possession was acquired fairly, and without Reed's intervention or collusion. The testimony of one of the defendants, however, tends to show that the possession was in fact acquired through Reed, and by means of some understanding or arrangement with him. And it is quite within the range of conjecture that the answer to the question ruled out by the court, had it been permitted to be given, would have in no way served the purposes of the defense. But we do not know that. The answer was erroneously suppressed, and we are left in the dark as to the facts it might have developed. It was the right of the defendants to have an answer. As the cause must go back for a re-trial, it is proper to add that if the plaintiff recovers at all, it must be upon the case made by the complaint. It has not been suggested that the complaint itself fails to state facts warranting a recovery. If, then, these facts are satisfactorily shown in evidence, the plaintiff should recover; otherwise not. It is not perceived that Reed's relations to the Hannibal & St. Jo. Railroad Company, prior to his becoming the plaintiff's tenant, if he in fact became such tenant, have any legitimate bearing upon the issues involved. We think, therefore, that the court was right in excluding testimony on that subject, and that all instructions based on the supposed presence of such testimony were properly refused; and this is all that is deemed necessary to say in regard to the instructions, except that the character of the case does not seem to require such a multiplicity of them.

If Reed took a lease from the plaintiff, and accepted the position of tenant under him, he thereby admitted the plaintiff's title; and neither he nor those claiming under him are at liberty to dispute that title, unless Reed was induced to accept the lease through some fraud or imposition on the part of the plaintiff. The question of title is in no way involved in this suit; but this suggestion indicates one of the results of the existence in fact of the relation of landlord and tenant between the plaintiff and Reed.

For the reasons herein developed, the judgment is reversed and the cause remanded. The other judges concur.

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Buchanan v. Tracy et al.

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PORTER BUCHANAN, Appellant, v. ROBERT TRACY *et al.*,  
Respondents.

1. *Sheriff, sale by — Mistake as to date of, in return and recitals of deed.*—

Land was advertised by the sheriff to be sold, and was in fact sold, on the 5th day of January. But the sheriff's return, and his recitals in the deed to the purchaser, declared the sale to have been on the "4th" of January. *Held*, 1st, that the mistake in the return as to the day of sale was not material, for the reason that it was not necessary to the validity of the purchase that the sheriff should make a correct return, or any return at all; and 2d, that the mistake as to the exact day of sale, occurring in the deed, was also immaterial, provided that the deed on its face was according to law, showing a sale at an authorized day during term of court.

*Appeal from Fifth District Court.*

*Ensworth & Bassett*, for appellant.

The sheriff's deed is void, in not having the recitals required by the statute. (R. C. 1855, ch. 63, §§ 54, 56; 18 Mo. 580; 36 Mo. 115; 37 Mo. 194.) The conveyance of land by a sheriff upon sale under execution is a statutory power, and the statute must be pursued strictly; otherwise the conveyance passes no title. (Allen v. Moss, 27 Mo. 364; 9 Mo. 156; 18 Mo. 586-7.)

*Vories & Vories*, and *Vineyard, Woodson & Young*, for respondents.

BLISS, Judge, delivered the opinion of the court.

The plaintiff brought ejectment in the Buchanan Common Pleas against Tracy, who occupied under William Atchison. Atchison defended the suit, and showed title by virtue of a sheriff's sale to him upon judgment and execution in his favor against the plaintiff. He also set up a former recovery upon a petition in equity, by the same plaintiff, against the said Atchison, upon which petition judgment was rendered against the plaintiff in the lower court and affirmed in the Supreme Court. (Buchanan v. Atchison, 39 Mo. 503.) The plaintiff claimed that the execution and sale were irregular and void, and passed no title, and that these questions were not adjudicated by the former suit. The Common



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Pleas gave judgment for defendant, and the District Court affirmed the judgment.

The plaintiff claims as irregularities that the execution upon which the sale was made had expired before the sale; also, that the sale was not made upon the day named in the advertisement. The execution was issued August 12, 1863, returnable at the next September term. The levy was made August 15, and the deed and return both show that the sale was made during the December term, 1863, of the said Court of Common Pleas, and on the 4th day of January, 1864, agreeably to that notice, etc. That the sheriff had a right, under the statute of March 23, 1863, extending executions (Acts 1863, p. 20), to sell at a subsequent term, is very clear, especially under the liberal interpretation given to the statute in *Stewart v. Severance*, 43 Mo. 322. Section 2 provides that executions hereafter issued and levied upon real estate, if the property be not sold at the next term, shall, with the levy, remain in full force until a term is held when it can be sold. For the views of this court upon this statute, it is only necessary to refer to its opinion in said case. But the deed and return of the sheriff show that the sale was made on the 4th day of January, while the notice given in evidence below advertises the land to be sold on the 5th. It was, however, clearly established that the sale was actually made on the 5th, and that the return and recital in the deed were so far mistakes. Does this mistake in the return, followed up in the deed, vitiate the sale? Is it a substantial irregularity, or conclusive evidence of one? or a mere clerical misprision of the officer, by which no one is injured, and which should not affect the legality of his proceedings? The effect of a mistake in reciting the date of the judgment was considered at some length in *Stewart v. Severance*, and upon full argument it was held not to affect the title. But plaintiff claims that the mistake of a sheriff in his return, and in reciting in the deed his own proceedings, are not entitled to the same indulgence. It is said that the return of the sheriff can not be contradicted; that it must be taken as true, except in a direct proceeding to impeach it. This proposition is, in general, correct; but the return of the sheriff itself cuts no figure in this

case. It is not necessary to the validity of the purchase that he make a correct return, or make any return at all.

We find in the reports of Massachusetts and other Eastern States decisions that seem to contradict those of New York and other States in reference to the regularity of legal proceedings under which title is claimed. But this apparent contradiction arises from the retention in those States of the writ of *extent*, and its application to private debts. Under their system there is no sale, but the execution is *extended* over the land, which is appraised and transferred to the creditor. All the proceedings are to be recorded, the officer must return them, and it is held that they must show that the requirements of the statute for transferring the property have been complied with. (U. S. v. Slade, 2 Mason, 75; Williams v. Amory, 14 Mass. 20; Metcalf v. Gillett, 5 Conn. 400.) But a different rule prevails where lands are sold upon execution, as in Missouri. The general doctrine upon the subject is given by the Supreme Court of the United States in Wheaton v. Sexton, 5 Wheat. 503. An action of ejectment was brought by the purchaser, who was also the creditor, and the defense was set up that the marshal failed to return his proceedings. The court held that to be no defense, and the judge said: "The purchaser depends on the judgment, the levy, and the deed. All other questions are between the parties to the judgment and the marshal. Whether the marshal sells before or after the return, whether he makes a correct return, or any return at all, to the writ, is immaterial to the purchaser, provided the writ is duly issued and the levy made before the return." Long before this, in Jackson v. Sternberg, 1 Johns. Ch. 153, the Supreme Court of New York held that it made no difference, so far as the sale was concerned, whether the sheriff's return was correct, or whether he made any return. This has been the general doctrine, and those cases are quoted as authority in the later opinions. No different ruling, so far as the return is concerned, has been had in Missouri, nor is there anything in our statute that would call for one. The objection, then, that the evidence contradicted the return, was not well taken.

It is claimed, however — and this is the real question — that as

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our statute (Gen. Stat. 1865, ch. 160, § 54) requires certain recitals in the deed, the facts must be recited truly. The requirement is plain, and among them must be "the time, the place, and manner of sale." To require clerical accuracy in all the recitals of the deed, when it shows that the requirements of the statute have been complied with, and when in fact they have been complied with, would often work great hardship. In the case at bar, the decision of the question one way or the other is of but little consequence; as, if the case is sent back, the sheriff will be permitted to amend his return, and may make a new deed, which will relate back to the day of the levy, and save the purchase. But in investigations of title, questions based on these recitals are likely to arise many years after the event, and too late to directly remedy any mistake made in them. Some reasonable rule should therefore be adhered to—one consistent with the requirements of the statute, and one that should not unnecessarily subject our titles to the chance of clerical blunders when those requirements have been followed.

This general subject has been frequently under consideration. I need not refer to authorities in those States where special recitals are not expressly required, for it may reasonably be said that they ought not to control the positive requirements of our statute. But I find the same spirit of liberality, the same regard to substance rather than form, almost universally prevalent. In Ohio the statute requires a recital of the executions or their substance, the names of parties, amount of judgment, and date of term when rendered; and yet the courts of that State have uniformly sustained the deeds of the sheriff, although the recitals are informal, and some of them omitted. The case of *Armstrong v. McCoy*, 8 Ohio, 128, and *Perkins v. Dibble*, 10 Ohio, 433, are referred to by Judge Scott in *Tanner v. Stine*, 18 Mo. 580; and while he criticises them somewhat, I do not understand him as questioning their authority. The decisions in both cases are, in substance, that the statutory requirements in regard to the recital of a sheriff's deed are peremptory, and to be followed in detail only so far as they are necessary to show the officer's authority to sell, and that a mis-recital of the execution will not

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avoid the sale. In the first case Judge Grimke remarks: "It is true, our statute declares that the execution shall be recited, and it is often very difficult to distinguish between those ceremonies which are directory to the officer and those which are essential to the title. If any one general rule may be laid down, it is that every pre-requisite which can be considered as constituting the foundation of title is essential and indispensable, and that whatever does not partake of that character is merely directory. The word 'recite' was used in the statute long after it had obtained a technical legal meaning when applied to deeds. I refer to the well-known maxim that recital is not a necessary part of a deed." The courts of Kentucky, with a similar statute, are equally liberal in sustaining a sheriff's deed; and in New York, where the statute, though not expressly requiring any recitals in the deed, directs the officer to file with the clerk a certificate of the sale, it is held that the requirement is directory, is not a condition precedent, and that a failure in that respect does not affect the purchaser's title. (Jackson, etc., v. Young, 5 Cow. 269.)

But our statute goes further than those of Ohio and Kentucky. It is not only necessary to recite the judgment, execution, etc., the authority to sell, but also, as we have seen, "the time, place, and manner of sale." It would, therefore, seem that in Missouri the deed must not only show authority to sell, but also that the sale was made so far according to law. In *Tanner v. Stine* this court held that a deed which failed to state the date of the sale, or that it was made during a term of the Circuit Court, was invalid for the reason that the statute requiring all such sales to be made "on some day during the term of the Circuit Court for the county," etc., is imperative. This holding is perfectly consistent with the principles in regard to such deeds held by other courts—the difference being in the statutes only. Our statute makes it as necessary that sheriffs' sales be made during a term of court as that judgment be then taken; and it is never pretended that a recital of a judgment, or an execution upon a judgment, entered during vacation or during an impossible term, would sustain a conveyance. It is seen that the recitals of the

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sheriff's deed are so far essential that they must show authority to sell, and that the sale was made substantially according to law. Showing this, the deed, *prima facie*, passes the title. But it does not follow that every essential fact or transaction must be recited truly, in all its details, and that a mistake, as of date, is the same as a total omission. This would exclude the toleration of any clerical error, and would be contrary to our whole system. When a date is material—is of the essence of the act—it must be truly given; but this sale would be just as lawful on the 4th as on the 5th. A distinction should be made between a total omission of a necessary recital, or between such error in it as would render the proceeding invalid, and a clerical mistake that in no way affects the instrument on its face. Such was the mistake considered in the case of *Stewart v. Severance*; and I can see no ground whatever for the alleged difference between the clerical errors of a sheriff and clerk. The same reasons hold why the purchaser should not be affected by the one as the other. The recitals are not his acts, and his deed is good upon its face. The term refers not so much to the character of the officer who makes the mistake, as to the character of the mistake; and the principle involved in that case is precisely the same as in this. The statute as expressly requires the date of the judgment to be given as the time of the sale, and, besides, an error of the clerk in the date of the judgment is almost of necessity carried by the sheriff into the deed. The fact of a judgment duly rendered, and the fact of a public sale during a term of court, are both material. They are the foundation of the sheriff's deed, and it is worthless without reciting them. But it is not material whether the judgment be taken or the sale be made one day or another of the term; hence the mistake in the exact day is an immaterial one. It harms no one. In the case at bar, the deed shows upon its face that the proceedings were legal, as they were in fact; and mere clerical errors, to which all officers are liable, should not, upon an immaterial point, be permitted to invalidate a regular proceeding.

It becomes unnecessary to consider the other matter of defense, and the judgments of the courts below are affirmed. The other judges concur.

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Hannibal & St. Joseph R.R. Co. v. Moore.

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HANNIBAL & ST. JOSEPH RAILROAD COMPANY, Respondent, v.  
JEREMIAH P. MOORE, Appellant.

1. *Ejectment—Railroad lands—Congressional grant—Filing map of land in county records.*—In case of suit in ejectment by the Hannibal & St. Joseph Railroad Company, under the act of Congress of June 10, 1852, and the Missouri statute of September 20, 1852 (R.R. Laws, p. 117), where no question was made as to the location of the road, nor was it questioned that the land sued for was included within the grant by Congress, nor was it urged that the land had been sold by the United States, or that any right of pre-emption had attached to it, nor was it disputed that plaintiff's proof made out a *prima facie* case—the mere non-recording in a given county of the map of lands taken by the railroad company in that county, as directed by the act of September 20, would not be fatal to plaintiff's recovery.

*Appeal from Fourth District Court*

*Easley & Mullins*, for appellant, cited Railroad Laws, 117, § 7; *Pacific R.R. v. Lindell's Heirs*, 39 Mo. 342; *Baker v. Gee*, 1 Wall. 333; *Papin v. Ryan & Walker*, 32 Mo. 21-24; *Hann. & St. Jo. R.R. Co. v. Smith*, 41 Mo. 310.

*Carr, Hall & Oliver*, for respondent.

CURRIER, Judge, delivered the opinion of the court.

The opinion of the court, delivered in this cause when it was previously here, embodies a statement of the main facts exhibited in the present record. (37 Mo. 338.) It is therefore unnecessary to repeat them here. The point now pressed upon our attention relates to the supposed effect upon the plaintiff's title of the non-recording in Linn county of the map of lands taken by the plaintiff in that county. The act of September 20, 1852 (R.R. Laws, 117, § 7), directed the recording of such map in the county where the lands taken were situated, and it is insisted that the failure to cause such record to be made was a fatal omission.

When this case was previously in this court, it was decided that the act of Congress of June 10, 1852 (10 U. S. Stat. at Large, 8) and the act of the Legislature of this State, of September 20, 1852, amounted to a legislative grant of the even-numbered sections of land within six miles of the line of the



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plaintiff's railroad, as soon as the lands were designated by a definite location of the road in accordance with these acts, unless such lands had been previously sold by the United States, or some pre-emption right had been acquired therein. No question is made as to the location of the road; nor is it questioned that the land sued for is included within the grant; nor is it urged that the land had been sold by the United States, or that any right of pre-emption had attached to it; nor is it disputed that the plaintiff's proofs made a *prima facie* case. The defense rests upon the single fact of the non-recording of the aforesaid map in the county of Linn. Until such record was made, it is insisted that no title vested in the plaintiff; and further, that proof of the fact of the non-recording destroyed the plaintiff's *prima facie* case.

The objection taken is not available to the defendant. What might be its effect under a different state of facts, it is not necessary to inquire. The defendant does not fall within the exception stated in the former decision. He sets up no rival claim or title. He does not pretend to hold under the United States, or as pre-emptor, or as having succeeded to the rights of a pre-emptor. He stands on his naked possession. As against him, the plaintiff's *prima facie* case must prevail.

With the concurrence of the other judges, the judgment will be affirmed.

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JAMES F. TULL, Trustee, etc., Respondent, v. HERMAN DAVID,  
Appellant.

1. *Trusts — Trustee's sale — Purchaser, auctioneer not agent for.*—When, at an auction sale under a deed of trust, the trustee acts as his own auctioneer, he can not bind the purchaser by a memorandum of the sale made by himself, so as to hold him liable, within the meaning of the statute of frauds (Wagn. Stat. 656, § 5). Although acting as auctioneer, he is a party to the sale, with natural interest and bias adverse to the purchaser; and the circumstance that he has no beneficial interest in the subject of the sale settles nothing as to his bias.

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*Appeal from Fifth District Court.*

*Hall & Oliver*, for appellant.

I. A necessary party to a suit can not be the agent of either party to the contract, on a sale of property at public auction, so as to bind him by signing the memorandum, although he has no beneficial interest in the contract. (Browne on Frauds, §§ 367-8, note 1; *Buckmaster v. Harrop*, 13 Ves. 456; *Smith v. Arnold*, 5 Mass. Ch. Cas. 417; *Bent v. Cobb*, 9 Gray, 397.)

II. Although it seems to be settled that an auctioneer, sheriff, or the like, is the agent of both parties at the sale of property, yet if the action is brought by him, his signature will not be sufficient, within the statute of frauds, to bind the purchaser. (2 Stark. on Ev. 492.)

III. The memorandum relied on here is no memorandum at all, within the statute of frauds, because not signed by appellant, or any one by him authorized, in a manner which authenticates it as his act. (Browne on Frauds, §§ 357-8.)

*Vories & Vories*, for respondent.

CURRIER, Judge, delivered the opinion of the court.

This suit was brought to recover the amount of the defendant's bid at an auction sale under a deed of trust. The plaintiff was the trustee in the deed, and acted as his own auctioneer at the sale. The property was struck off to the defendant as the best bidder, and the plaintiff thereupon entered on the margin of the paper containing the advertised notice, and contiguous thereto, a memorandum of the sale, thus: "Sold to Herman David, for five hundred dollars." The notice described the property and contained a statement of the terms of sale.

The defendant resists the collection upon the ground that the contract of sale was within the statute of frauds (Gen. Stat. 1865, p. 106, § 5), and that it was therefore invalid. It is insisted that the plaintiff, being a party to the sale, and a necessary party to the suit to recover the purchase money, was incompetent to act in the transaction as the agent of the buyer; and it is therefore insisted that the memorandum of the sale made by

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him was invalid, and failed to bind the defendant. The position thus assumed by the defendant is undoubtedly sustained by the current of adjudicated cases, both English and American. Browne, in his work on frauds, states the matter thus: "One rule, however, has been settled, both under the fourth" (Gen. Stat. 1865, p. 438, § 5) "and seventeenth" (Gen. Stat. 1865, p. 438, § 6) "sections, that neither party can be the other's agent to bind him in signing the memorandum. And it makes no difference that the pretended agent has not himself any beneficial interest in the contract, but stands in a fiduciary relation to third persons, so long as he is, in a legal point of view, the real party to, and the proper one to sue upon, the contract." (See Browne on Frauds, § 367, and the authorities cited; also, 3 Pars. on Cont. 11, note r.) In *Bent v. Cobb*, 9 Gray, 397, Bigelow, J., reasons upon the subject as follows: "The great mischief intended to be prevented by the statute would still exist if one party to a contract could make a memorandum of it which could absolutely bind the other. If such were its true construction, it would be a feeble security against fraud, or, rather, it would open a door for its easy commission. A vendor could fasten his own terms on his vendee. If it was a written contract binding on the purchaser, he could not show by parol evidence that the terms of the bargain were incorrectly or imperfectly stated. He could not vary or alter it by the testimony of those present at the sale. The publicity of a sale by auction would be no safeguard against false statements of the terms of sale made in the written memorandum signed by a party acting in the double capacity of auctioneer and vendor. The chief reason in support of the rule that an auctioneer, acting solely as such, may be the agent of both parties, to bind them by his memorandum, is that he is supposed to be a disinterested person, having no motive to misstate the bargain, and entitled equally to the confidence of both parties. But this reason fails where he is the party to the contract and the party in interest also. \* \* \* Nor can it make any difference, as to the power of the vendor to make the memorandum binding on the vendee, that the sale is made by the former in his representative or fiduciary character as executor, administrator.

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guardian, or trustee. He is still the party to the contract; the price is to be paid to him; he is to deal with the purchase money; his interest and bias would naturally be in favor of those whom he represented; and, what is more material, in case of dispute or doubt as to the terms of the contract, his duties and interests would be adverse to the vendee. He would stand in a relation which would necessarily disqualify him from acting as agent of both parties." The reasoning of Judge Bigelow commends itself to the approval of my judgment, and I adopt it in full. The circumstance that the trustee may have no beneficial interest in the subject of the sale, necessarily settles nothing as to his mental biases. By reason of his relations to the beneficiary, he may be as deeply interested in the results of the transaction as though he were the sole owner of the property and the proceeds of the sale were coming to him alone. The relation of trustee and *cestui que trust* is usually, as well in fact as in law, a relation of personal trust and confidence.

The trustee may be the father or other near relative of the beneficiary, and if one trustee may act in the triple capacity of vendor, auctioneer, and agent of the buyer, why not all? Where is the line of distinction to be drawn between different trustees or classes of trustees? We are referred to no decided case that adopts the principle contended for by the plaintiff in this suit. The nearest approach to it is found in the case of *Wiley v. Roberts*, 27 Mo. 388, and *Stewart v. Garvin*, 31 Mo. 36; where it is held that a sheriff, in selling lands under an order of court in proceedings for partition, is a competent agent of the parties to make a binding memorandum of the sales made by him; that a proper memorandum made by him binds the parties and withdraws the contract of sale from the influence of the statute of frauds. But the sheriff in such cases acts simply in the execution of a judicial power of sale, and not in strictness as a trustee. No title is vested in him. He acts merely as the instrument of the law in effecting the sale and conveyance. He is a public officer, and holds his position under the provisions of law, and not as the mere appointee of private parties. His public position and responsibility afford some security at least that his public duties

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will be discharged with uprightness and impartiality. At all events, this court has only gone to the extent of holding that a sheriff's memorandums of auction sales made by him in his official character were valid and binding on the parties, as being made by their duly authorized agent. It has not been held that executors, administrators, guardians, and other trustees are competent to act in the triple capacity of vendors, auctioneers, and agents of the parties, all at one and the same time, and so as to make their mere memorandums of sales binding on the parties as a written contract by them duly executed and delivered. Nor are we prepared to take that long step forward in that direction. We do not question the power of an auctioneer, who acts in that capacity alone, to make a memorandum of a sale at auction, which shall bind the parties, although it might be necessary to sue on the contract thereby evidenced in the name of such auctioneer. We limit our decision strictly to the case at bar, holding that the memorandum appearing in this record was inoperative, as not being executed by the "party to be charged therewith, or some other person by him thereto lawfully authorized."

The judgment of the District Court is reversed and the cause remanded. The other judges concur.

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B. M. FORD, Appellant, v. NATHAN A. WINTERS, Respondent.

1. *Practice, civil—Supreme Court—Appeal dismissed, when—Statement and points not filed.*—When appellant files no statement of the case, or points intended to be insisted upon in the argument, the appeal will be dismissed.

*Appeal from Fourth District Court.*

*Shanklin & Peery*, for respondent.

*Metcalf*, for appellant.

BLISS, Judge, delivered the opinion of the court.

This case comes here by appeal, and the appellant files no statement of the case, or point intended to be insisted upon in the argument, as required by law.

The appeal is dismissed; the other judges concurring.

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THOMAS R. SMITH AND WIFE, Respondents, v. THE CITY OF ST.  
JOSEPH, Appellant.

1. *Practice, civil—Failure to file replication—Objection on account of, not considered unless raised in lower court.*—When the answer sets up new matter, and no replication is filed, defendant should move for judgment on the pleadings; and if no objection is taken or point raised as to any insufficiency or defectiveness in the court below, they will not afterward be considered in the Supreme Court.
2. *Damages—Defect in street—Previous knowledge of on part of person injured, a fact to be submitted to the jury.*—The fact that a person injured by a defect in a highway or street had previous knowledge of the defect, is not conclusive evidence of negligence on his part. It is a fact to be submitted, with other evidence, to the jury; and in an action to recover damages for an injury caused by such defect, it is only necessary for plaintiff to show that he exercised ordinary care to avoid the accident.
3. *Damages—Negligence—Corporations liable for injuries happening by reason of.*—Municipal corporations are bound to keep the streets and highways in a proper state of repair, free from obstructions, so that they will be reasonably safe for travel; and if they fail to do this, they will be held liable for all injuries happening by reason of their negligence.

*Appeal from Fifth District Court.*

*Grubb, Hall & Oliver*, for appellant.

Plaintiffs knew the street mentioned in the petition was dangerous when they entered upon it. They had no right to proceed and take their chances, and, if they were actually injured, look to the city for indemnity. (*Harton v. Inhabitants of Ipswich*, 12 Cush. 492; *Willson and Wife v. City of Charleston*, 8 Allen, 188; 3 Allen, 21; *Fox v. Town of Glastenburg*, 29 Cow. 205; 50 Maine, 222; 51 Maine, 127.)

*Woodson, Vineyard, and Young*, for respondents.

WAGNER, Judge, delivered the opinion of the court.

Action brought in the Circuit Court of Buchanan county to recover damages against the city of St. Joseph for injuries sustained by Mrs. Smith, one of the plaintiffs, in consequence of falling down an embankment in one of the streets of the city, and which is alleged to have been negligently left in an exposed



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and dangerous condition. Defendant, in its answer, avers that at the time the accident occurred, the plaintiff was well aware of the dangerous condition of the street, and that there were other streets that she might have traveled in returning from church to her house with safety, and that the injury she received was the result of her own carelessness and negligence. To this answer no reply was filed. The cause was heard before a jury, who awarded the plaintiff damages, upon which judgment was rendered in the Circuit Court and affirmed in the District Court.

It is now insisted by the counsel for the appellant that the facts stated in the answer stand admitted, and that they are sufficient to preclude the plaintiff from recovering. In the statute it is provided that "if the answer contain a statement of new matter, and the plaintiff fail to reply or demur thereto within the time prescribed by the rule or order of the court, the defendant shall have such judgment as he is entitled to upon such statement; and if the case require it, a writ of inquiry of damages may issue." (2 Wagn. Stat. 1017, § 16.) Where the answer sets up new matter, and no replication is filed, the defendant should move the court for judgment upon the pleadings. That the Legislature intended such should be the practice, is plain; for a writ of inquiry of damages is provided for in the event that such a proceeding would be applicable or necessary. But no notice was taken of the failure to file the replication in the court below; the parties proceeded to trial upon the evidence; no objection was taken or point raised as to any insufficiency or defectiveness in the pleading, and I am not disposed to consider the question at this time. As the action is founded strictly on matters of fact, it is only necessary to see whether the law was properly declared to the jury.

In substance, at the request of the plaintiffs, the court instructed the jury that if defendant, in grading Fifth street, caused a dangerous embankment on a traveled street, leading into what is known as Faraon street; and if defendant permitted said embankment to remain for many months without any obstruction, by fence or otherwise, to prevent persons from being precipitated from said embankment; and without any light in the night time

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near said embankment, to warn travelers of their danger, then said defendant was guilty of negligence; and that if plaintiff, knowing the condition of said Faraon street, passed along the same in the night time towards Fifth street, and used ordinary care to avoid said embankment; but if, owing to the darkness of the night, plaintiff missed the graded portion of Faraon street, and was thereby precipitated from said embankment into Fifth street, by reason of which the plaintiff sustained great injury, then the jury should find for plaintiff, and give damages for the full amount of injury sustained.

At the instance of the defendant, the court gave five several instructions, numbered four, five, eight, nine, and ten, respectively. The fourth instruction told the jury that unless they believed from the evidence that the plaintiff used reasonable care to avoid the injury, they should find for the defendant. The fifth declared that the burden of proof was on the plaintiff to show that she used ordinary care to avoid the injury, and that said injury was not the result, in whole or in part, of any carelessness or negligence on her part, and that it was not incumbent on defendant to prove that the injury was caused in whole or in part by the carelessness of the plaintiff. The eighth instruction was to the effect that unless the jury believed that the defendant was guilty of negligence in leaving the street on which the accident occurred in an unsafe condition, they should find for the defendant. The ninth instruction is as follows: "In determining the question of carelessness or negligence on the part of plaintiff, the jury will take into consideration all the facts and circumstances proved, including the condition of the street, the darkness and storminess of the night at the time plaintiff attempted to pass said street, and the knowledge of the plaintiff of the condition of the street; and if, from all the evidence, they believe that negligence or want of ordinary care and prudence on the part of plaintiff contributed to the happening of the accident which caused the injuries sued for, they will find for defendant." The tenth reiterates a principle previously announced — that if, from the evidence, the jury should believe that the plaintiff might have avoided the accident and injuries by the exercise of ordinary

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prudence and care under the circumstances, they should find for defendant.

It will be seen that the instructions given by the court on both sides most completely cover the whole case. We are not prepared to say that we entirely approve all the instructions given on behalf of the defendant, for some of them are too favorable, and go further than the prior rulings of this court warrant; but if any error was committed, it was in favor of the defendant, and it can not complain.

✓ The fact that a person injured through a defect in a highway or street had previous knowledge of the defect, is not conclusive evidence of negligence on his part. It is a fact to be submitted, with the other evidence, to the jury, as was done in this case; and in an action to recover damages for an injury occasioned like the one in the present case, it is only necessary for the plaintiff to show that he exercised ordinary care to avoid the accident.

In the case of *Blake v. The City of St. Louis*, 40 Mo. 569, we decided that municipal corporations are bound to keep the streets and highways in a proper state of repair, free from obstructions, so that they will be reasonably safe for travel; and if they neglect to do this, they will be held liable for all injuries happening by reason of their negligence.

The negligence of the corporation in regard to its duty, and ordinary prudence and care on the part of the individual, form the necessary elements of what it takes to constitute a cause of action. In the present case the jury have found that both of these circumstances occurred.

Judgment affirmed. The other judges concur.

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JAMES HUNTER, Appellant, v. JEFF. CHANDLER, Respondent.

1. *Quo warranto*—*Proceedings in, by attorney-general, do not settle title of claimant to office.*—In case of information by the attorney-general in behalf of the State, against one holding an office, the private rights of a third party claiming it are not determined. When a private person wishes to have his right to an office adjudicated, the information should be prosecuted at his relation and proceeded upon as in *quo warranto*. (Wagn. Stat. 1133, § 2.)

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2. *Quo warranto* should not be brought before Supreme Court, except, etc.—

Except in peculiar cases, the Supreme Court will refuse to allow an information to be filed before it to inquire into the title of a private person to an office. Parties should, in general, resort in such cases to the Circuit Court.

3. *Quo warranto* commenced prior to resignation, prosecuted afterward—Suit for fees after expiration of term, etc.—The resignation of an officer or expiration of his term will not prevent an information to test his title, if commenced prior thereto, from being afterward prosecuted to final judgment; and *semble*, that suit for money had and received during his term will lie against him, although commenced after resignation or expiration of term; provided, that plaintiff had been once in possession, and had been unlawfully ousted. But when the title is in doubt, proceedings in *quo warranto* must be first had to settle that issue.*Appeal from Fifth District Court.*

*Bassett, Hunter & Gilbert*, for appellant.

I. The plaintiff being entitled to the office, and the defendant, a stranger, taking its fees by usurpation, plaintiff is entitled to recover damages in an action at law. (*Powell v. Millbank*, 1 T. R. 399; *Boyten v. Dodsworth*, 6 T. R. 681; *Allen v. McKean*, 1 Sumn. 317; *Glasscock v. Lyon*, 20 Ind. 1; 3 Blackst. 102, ¶ 5; 1 Chit. Pl. 100; Chit. on Cont. 640; *Oliver's Precedents*, 105.)

II. If the defendant, by his resignation, could prevent a judgment of ouster, and if the consequence of that prevention is a defeat of this action, the rights of the plaintiff might be defeated at the will of the wrong-doer. (*Boyten v. Dodsworth*, *supra*; *Allen v. McKean*, *supra*; *Powell v. Millbank*, *supra*; 1 Tanner, 113; *Howard v. Wood*, 2 Lewis, 245; 20 Ind. 1; 1 S. N. P. 81; 23 U. S. Dig. 429; 1 Chit. Pl. 112.)

*Hall & Vories*, for respondent.

I. Plaintiff's right can not be established except by direct proceeding in the nature of a *quo warranto*. (21 Pick. 148-155; 6 Cow. 23; 17 Iowa, 525; 17 Conn. 585; 9 Johns. 147; 42 Mo. 180; 38 Mo. 544; 35 Mo. 146; 36 Mo. 71; 34 Mo. 395.)

II. A writ of *quo warranto*, brought within the time of an office, may be tried after the term has expired. (24 U. S. Dig.

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545, §§ 6, 9; 8 Wend. 396; 12 Mich. 508; 45 Penn. St. 59.)

III. An information in the nature of a *quo warranto* will not lie, except brought by the government. (4 Curtis, 632; Wallace v. Anderson, 5 Wheat. 291.)

WAGNER, Judge, delivered the opinion of the court.

As this case was determined in the case below on demurrer, it will be necessary to look into the petition to see whether it sets out a cause of action. The plaintiff states in his petition that during the most of the year 1865, and also in the year 1866, up to the first of April, he was city attorney for the city of St. Joseph, duly elected and qualified, so as to be entitled to the accustomed fees and emoluments of the office for the whole time mentioned; that about the first day of April, 1866, the defendant, without plaintiff's leave or authority, usurped and intruded himself into said office, and from the time last mentioned until about the last of March, 1867, defendant continued to usurp and intrude himself into said office, during all of which time he continued to receive the accustomed fees and emoluments thereof, to and for the use of the plaintiff; that plaintiff was the only lawful city attorney during the time last before mentioned, and the only person entitled to discharge the duties and receive the emoluments of the office.

It is further averred that at the March term, 1867, of this court, the attorney-general of the State exhibited an information in the nature of a *quo warranto*, in the name of the State and upon his own relation, charging the defendant with usurping and intruding into the said office, and asking that he be ousted therefrom; that thereupon the defendant, in order to avoid a judgment of ouster, did immediately vacate the office and resign all right to the same; and that when the case came on to be heard, defendant disclaimed that he was holding said office, or was in possession thereof, and presented his resignation, duly approved by the mayor of St. Joseph; and that in consequence of said resignation, the attorney-general took no further steps with the case.

The petition then alleges that the defendant, whilst so exercising the duties of the office, received fees and emoluments accruing therefrom to the amount of \$3,000, and judgment is

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asked for that sum. This petition was demurred to, and demurrer sustained. Whether the defendant resigned and vacated the office to avoid a judgment of ouster, at the instance of the State, is not material as regards the rights of the plaintiff. The information was by the attorney-general, on behalf of the State, to protect the public against usurpation and intrusion; and in such a proceeding the private rights of a third party claiming the office are not determined or passed upon. The State, acting through its law officer, does not establish the rights of private persons to an office; it only maintains its own dignity and protects the public interests by ousting those who usurp or intrude into office and unlawfully exercise its franchises. Where a private person wishes to have his right to an office adjudicated, the statute points out the course to pursue. It provides that the information shall be prosecuted at his relation, and shall be proceeded upon in such manner as is usual in cases of a *quo warranto*. (2 Wagn. Stat. 1133, § 2.) As the proceedings generally raise questions of fact, and the parties have an ample remedy in the Circuit Court, and this court being chiefly an appellate tribunal, it will refuse, except under peculiar circumstances, to allow an information to be filed to inquire into the title of a private person to an office. (State v. McIlhanay, 32 Mo. 379; State v. Lawrence, 38 Mo. 535; State v. Buskirk, 43 Mo. 111.) Had the attorney-general proceeded with the information filed by him to a final determination, the judgment would have fixed the rights of the defendant to the office, but not those of the plaintiff. The plaintiff was no party to the record, the information was not at his relation, and his title could not have been passed upon.

But the resignation of the incumbent, or even the termination of the office, would not prevent the information from being prosecuted to a final judgment if the proceedings were commenced prior to the resignation or the expiration of the term. (Commonwealth v. Smith, 45 Penn. St. 59; People v. Hartwell, 12 Mich. 508.) The law will not permit the ends of justice to be defeated at the mere volition of a party who seeks to elude its judgments by changing his condition for his advantage. I think, therefore,



that an information in the nature of a *quo warranto*, to try the right to a public office, may be tried after the term has expired, or the officer holding has resigned, if the information was filed or proceedings begun before the resignation took place or the term had expired. The question has been mooted whether an action of this character was maintainable. About this I have no doubt. The authorities abundantly establish the principle that an action for money had and received will lie in favor of a person really entitled to an office, against one who has usurped and intruded into the same, for the recovery of the known and fixed fees that such intruder may have received. (Glasscock v. Lyon, 20 Ind. 1; Powell v. Millbank, 1 T. R. 399, note; Boyten v. Dodsworth, 6 T. R. 481; Lightly v. Clouston, 1 Taunt. 113; Sadler v. Evans, 4 Burr. 1984; Allen v. McKean, 1 Sumn. 317; 1 Selw. N. P. 81; 1 Chit. Pl. 112.)

The doctrine which underlies these cases, and upon which the rule rests, is that if one man receive money which ought to be paid to another or belongs to him, the action for money had and received will lie in favor of the party to whom of right the money belongs. In Allen v. McKean, *supra*, Judge Story held that there was no difficulty in maintaining the suit simply because it involved a trial of the title to the office, if the party had once been in possession. In that case, Allen, the plaintiff, was, and for some time previous to the commencement of the suit had been, president of the Bowdoin College, and he had been illegally superseded as such president. He prosecuted the action to recover certain fees due him as such officer, and the judgment of the court was that he was entitled to recover. But there he was the incumbent, and had been unlawfully ousted. In the present case it is not shown that the plaintiff was in actual possession at the time the usurpation and intrusion complained of took place. There is no direct or express allegation that the plaintiff was inducted into the office at the time. But there is an averment that the defendant was in under a commission; for it is stated that he resigned the same with the approval of the mayor. This shows that a contest or some kind of litigation was necessary to determine to whom the office really belonged.

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It has often been decided by this court that the officer derives his right to the office from his election or appointment, and that the commission is simply evidence of his title. Where he has been fairly and legally elected, his right at once becomes absolute; and if another person, by unjust, false, or fraudulent means, gets possession of the office, exercises its duties and enjoy its franchises, he will be responsible to the rightful occupant for all the accustomed fees and emoluments when the right is finally established. This brings us to the next question, namely: whether the title to the office can be determined in an action of this kind, where the party claiming sues for the fees, or whether he must first establish his right by some appropriate legal proceeding. Where the party had once been in possession, and he was unlawfully ousted by an intruder, there might be no difficulty in applying the rule laid down by Justice Story in *Allen v. McKean*. But where such was not the fact, and the title was in doubt, such a principle would be productive of the greatest confusion, and would lead to endless and unnecessary litigation.

I am aware that there are very respectable authorities holding that the title to an office may be determined in a suit for fees. The old English cases strongly sustain this view; but I think that the better doctrine and reason is to the contrary. In the case of *The State to use of Bradshaw v. Sherwood et al.*, 42 Mo. 179, we decided that an action would not lie to recover damages for being deprived of an office where the plaintiff did not claim the office and another person was in possession; that it was necessary for the plaintiff first to establish his right in a proceeding for that purpose in order to show that he was damaged. With that decision we are satisfied, and see no good reason for departing from it. The right or title to an office ought not to be determined in a civil action of this kind. A party should not be permitted to sleep on his rights, and let another person perform services, and then claim the compensation which was the result of the labor performed. When the defendant obtained possession of the office, the plaintiff should have either proceeded to contest his right, or resorted to his *quo warranto*; and upon judgment rendered in his favor, he then might have maintained

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his action for the recovery of the fees and emoluments of which he had been unjustly deprived. But as no steps were taken to establish his title—and it has not been even yet established—I think the judgment of the lower court was right and should be affirmed.

Judgment affirmed. The other judges concur.

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STATE OF MISSOURI *ex rel.* JOSEPH DOME *et al.*, Defendant in Error, *v.* ORVILLE WILCOX, Plaintiff in Error.

1. *Act as to organizing schools not unconstitutional because to be submitted to popular vote.*—The Legislature can not propose a law and submit it to the people to pass or reject it by a general vote. But chapter 47 of Gen. Stat. 1865, authorizing cities, etc., to organize for school purposes, became valid on its passage; and if the people, by vote, elected not to avail themselves of its privileges, their action did not in the least impair its force. It can not be held unconstitutional merely because it depends for its efficacy on the vote of the people.
2. *Act as to organizing schools, etc., not unconstitutional, as being special in its nature.*—Chapter 47, Gen. Stat. 1865, is not obnoxious to section 27, article 4, or section 4, article 8, of the constitution, as being special in its nature. Special statutes therein referred to are such as relate to individual classes or particular localities. Had the act applied to a certain specified town or a single corporation, it would have been in conflict with those sections. That law is as general as is consistent with its scope and design, and no law more general could be framed to effectuate the object in view.
3. *Act as to organizing schools—Loaning credit by town, for purpose of, constitutional.*—Section 14, article 11, of the State constitution has exclusive reference to municipal corporations becoming stockholders and loaning their credit to private companies, associations, and corporations, and can not be applied to a case where (as under chapter 47, Gen. Stat. 1865) a town loans its credit for public school purposes.

*Error to Fifth District Court.*

McFerran, Collier, and Broaddus, for plaintiff in error.

I. Chapter 47, Gen. Stat. 1865, is unconstitutional. It is not a law of its own force, but depends for its vitality upon a vote of the people of the locality, which vote can neither make it a law nor repeal the general law under which the plaintiff in error claims a right to the office of school director. (State v. Scott, 17 Mo.

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521, 530; Const. Mo., art. 3, § 1, art. 4; 23 Barb. 355; 4 Seld. 483; 4 Ind. 347; 10 Ind. 72; Barto v. Himrod, 8 N. Y. 483; 5 Iowa, 496; Sedgw. on Stat. and Const. Law, 165; 2 Iowa, 205-6, confirmed in 9 Iowa, 203; 8 N. Y. 489, 490; 23 N. Y. 456; 1 Ohio St. 622; 16 U. S. Dig. 130, § 8; 19 U. S. Dig. 130, § 8; *id.* 128, § 19; 18 U. S. Dig. 138; Lafayette v. Jenners, 10 Ind. 70; Parker v. Commonwealth, 6 Barr. 507; Rice v. Foster, 4 Harr. 479.)

II. It is a special law, in cases for which provision can be and is required to be made by general laws, by the constitution of the State. (Const. Mo., art. 4, § 27; *id.* art. 8, §§ 4, 5; 5 Ind. 557; 10 Ind. 72; 23 N. Y. 447; 13 Cal. 175; Sedgw. on Stat. and Const. Law, 62, 482-7; 2 Bouv. Dic. 538, word "special;" 9 Cal. 502.)

III. The constitution requires equal provision to be made for all the children in the State between the ages of five and twenty-one years, in the matter of free schools; but chapter 47 destroys the equality of the constitution, and provides special privileges for the children, and imposes special burdens on the citizens in towns and villages not imposed upon other citizens of the State. (Const. Mo., art. 9, p. 40; Gen. Stat. 1865, ch. 47, p. 274.)

IV. Chapter 47 is unconstitutional and void, because in conflict with section 14, article 11, of the constitution, in this: that it authorizes the school corporation to loan its credit without the assent of two-thirds of the qualified voters.

*Blenis & Collins*, for defendant in error.

I. Chapter 47 is constitutional and valid. (State *ex rel.* Hixon v. Lafayette County Court, 41 Mo. 39-41; Blair v. Ridgley, 41 Mo. 63-175; Const. Mo., art. 8, § 4; Sess. Acts 1867, p. 160, § 5; 1 Blackst. 86; People v. Rogers, 13 Cal. 165; People v. Coleman, 4 Cal. 49; Smith v. Judge of Twelfth District, 17 Cal. 552; City of St. Louis v. Russell, 9 Mo. 512.)

II. Chapter 47 is a general law. (Sedgw. on Stat. and Const. Law, 15, 176; 1 Blackst. 86; Bouv. Law Dic., "special statutes;" Const. Mo., art. 4, § 27; Smith v. Judge of Twelfth District, *supra*.)

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III. It is no delegation of legislative power to so frame a law that by its terms it must be submitted for approval and be approved by those for whom it was made before it can bind them. (Hobart v. The Supervisors of Butts County, 17 Cal. 25-30, 35-6; Blanding v. Burr, 13 Cal. 357; Sedgw. on Stat. and Const. Law, 463; Moers v. City of Reading, 21 Penn. St. 189; Sharpless v. The Mayor of Philadelphia, 21 Penn. St. 157; Gibbons v. Ogden, 9 Wheat. 1; 4 Wheat. 122; Cincinnati R.R. Co. v. Commissioners of Clinton County, 21 Ohio, 77; Clark v. The City of Rochester, 14 Barb. 447; 18 U. S. Rep. 38; 1 Sto. Com. 411; Starin v. Town of Genoa, 23 N. Y. 446, 452-3, 499; The City of St. Louis v. Russell, 9 Mo. 512.)

IV. The provisions in chapter 47, for levying a tax for school purposes on all property found within the limits of any school district organized under it, are constitutional and general. (Blanding v. Burr, 13 Cal. 343, 390; Sedgw. on Stat. and Const. Law, 413, 463, 501, 554; Sharpless v. The Mayor of Philadelphia, 21 Penn. St. 147; Moers v. City of Reading, 21 Penn. St. 188; Const. Mo., art. 1, § 30; *id.* art. 9, §§ 7, 8; Sess. Acts 1867 p. 162, § 10; The People v. Coleman, 4 Cal. 49, 62.)

WAGNER, Judge, delivered the opinion of the court.

The relator instituted a proceeding in the nature of a *quo warranto*, in the Livingston County Circuit Court, to determine his right to the office of school director for the town of Utica, it being a school corporation organized pursuant to chapter 47 of the General Statutes of 1865. His right to the office was resisted by the defendant, who was a director under the township organization, formed under the general law of this State in relation to common schools.

It is not denied that the town of Utica organized under chapter 47, and that all the necessary forms and conditions prescribed by the act were fully complied with; nor is it denied that the relator was legally elected as a director, in pursuance of its provisions. But the resistance to his right is placed wholly and exclusively on the ground that the chapter in controversy is unconstitutional, and therefore utterly invalid. The court below sustained the

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validity of the law, and the question is brought here for review by writ of error.

A question of more grave and paramount importance to the people of this State could hardly be brought in this court. Nearly every town and village has organized under the law referred to. Acting in accordance with its authority, they have built school-houses, employed teachers, incurred debts, and systematized and put in operation rules and regulations, which have greatly redounded to our educational interests. Before a court would be justified in pronouncing against this system, and producing the inextricable confusion which must necessarily follow, it should furnish reasons for its decision, at once clear, cogent, and convincing. The first position assumed by the counsel for the plaintiff in error, to invalidate the proceedings, is that the chapter whence the authority is derived is not a law of its own force, enacted by the law-making power of the land, but depends for its existence upon a vote of the people of the locality where it is sought to be made operative.

The statute under which this contest arises authorizes the various cities, towns, and villages in this State to organize for school purposes, with special privileges. In order to do this, it provides that the qualified voters of the district, at an election to be held for that purpose, shall first vote to adopt the chapter. (See 2 Wagn. Stat. 1262-63, §§ 1-2 *et seq.*)

It is undoubtedly true that under our form of government, laws must be enacted by the legislative bodies to which the legislative power is committed by the constitution. The legislators can not divest themselves of the responsibility of enacting laws by a reference of the questions of their passage to their constituents.

One of the earliest cases on the subject is *Barto v. Himrod*, 4 Seld. 483, where the Legislature of New York framed a law concerning free schools. The Legislature did not enact or adopt the law; but the tenth section of the act declared that the electors should determine by ballot, at the next annual election, whether the act should or should not become a law. There it will be perceived that the Legislature merely proposed the law, and left its enactment to the people. The Court of Appeals



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held that the law having never been passed by the Legislature — the only body under the constitution that was competent to pass a law — it was void and of no effect.

In 1851, the Legislature of this State enacted a law concerning roads, the thirty-third section of which declared that, "if the County Court of any county should be of opinion that the provisions of the act should not be enforced, they might, in their discretion, suspend the operation of the same for any specified length of time, and thereupon the act should become inoperative in such county for the period specified in such order; and thereupon order the roads to be opened and kept in good repair, under the laws theretofore in force, as the special acts on the subject of roads and highways in the several counties of this State, that might take effect and be in force after the 4th of July next." The above section, giving the County Courts power to suspend the law at their pleasure, was adjudged by this court to be unconstitutional and void. (State v. Fields, 17 Mo. 529.)

The court said that the act was submitted to the control of every County Court, to make such order for its being in force in their county as they in their discretion might think proper. In other words, the act, by its own provisions, repealed the inconsistent provisions of a former act, and yet left it to the County Court to say which act should be in force in their county. The act did not submit the question to the County Court as an original question, to be decided by the tribunal, whether the act should commence its operation in the county; but it became, by its own terms, a law in every county not excepted by name in the act. It did not require, then, the County Court to do any act in order to give it effect. But being the law in the county, and having, by its provisions, superseded and abrogated the inconsistent provisions of previous laws, the County Court was by the section empowered, for such time as they might think proper, to suspend the act and revive the repealed provisions of the former act. When the question was before the County Court for that tribunal to determine which law should be in force, its action was the exercise of a legislative power which, under the constitution, could not be delegated to the County Court or any other body of

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State of Missouri ex rel. Dome at al. v. Wilcox.

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men in the State. The law was a positive enactment, and sought to give a tribunal the power to virtually repeal it, and revive another law in its stead. But in the same volume, in the case of *State v. Scott*, p. 521, it was intimated that a clause in a law establishing a new county, requiring it to be submitted to a vote of the people who were to bear the consequent burdens, might not be unconstitutional.

We have a general law on our statute book in regard to the incorporation of towns, investing the County Courts with the power to declare them incorporated upon the performance of certain conditions by the inhabitants. An attempt was heretofore made to overthrow this law for the reason that it was a delegation of political power, and that the proceedings of the court were legislative in their character. But this court has always upheld the law, holding that the corporation derived its whole power from the law, and that the court merely gave the law application when certain conditions were performed by the inhabitants. (*Kayser v. Bremen*, 16 Mo. 88, affirmed at the October term, 1869.)

The question was sharply contested and fully considered in the case of *The City and County of St. Louis v. Alexander*, 23 Mo. 483. There the act of the Legislature authorized the city of St. Louis to subscribe stock to the Ohio and Mississippi Railroad Company, to issue the bonds of the city, and to levy a special tax on all taxable property in the city, to pay the interest on the loan, provided that the qualified voters of the city should be in favor of such subscription. It was further provided that it should be the duty of the mayor of the city, immediately after the passage of the act, to order public notice to be given, in order that the sense of the qualified voters of the city might be tested as to the propriety of such subscription and loan on the part of the city. And the act prescribed how the election should be conducted; and if it should appear that there were more ballots for the subscription than against it, then the mayor and the council should subscribe the stock and issue the bonds. After great consideration, it was decided that the provision requiring the question of making the subscription to be submitted to the voters, was constitutional. (See also *State v. Binder*, 38 Mo. 450.)

Now, the Legislature can not propose a law, and submit it to the people to pass or reject it by a general vote. That would, indeed, be legislation by the people. But the proposition can not be successfully controverted, that a law may be passed to take effect on the happening of a future event or contingency. The future event—the happening of the contingency, or the fulfillment of a condition—affords no additional efficacy to the law, but simply furnishes the occasion for the exercise of the power. The law is complete and effective when it has passed through the forms prescribed for its enactment, though it may not operate, or its influence may not be felt, until a subject has arisen upon which it can act.

In the case we are now considering, the act took effect with the other laws contained in the statutes. It was passed according to the prescribed forms designated in the constitution. Its enactment did not depend upon any popular vote, but parties to be affected by it were at liberty to accept the privileges granted, and incur the burdens and obligations it would impose, as their interest or will should dictate. If they elected not to avail themselves of its privileges, it did not in the least impair its force; it still stood a valid enactment on the statute book. If they organized under it, they were entitled to the benefit of its provisions; but in either event the law remained the same. There is no pretense, therefore, for saying that the law is objectionable because it depends for its efficacy on the vote of the people. This point must be ruled against the plaintiff in error.

It is further contended that the law is invalid because it is special in its character, and contravenes section 27 of the fourth article of the constitution, which declares that "the general assembly shall pass no special law for any case for which provision can be made for a general law, but shall pass general laws \* \* \* for all cases where a general law can be made applicable." The section in the constitution cited enumerates certain things, and the Legislature is prohibited from passing certain special acts applicable to them. The law in question is not included in the enumeration; and if it is liable to any constitutional objection, it is because it falls within the class of subjects where a general law might be passed and made applicable. Under

the provisions of the constitution a special law may be passed, but it must be in a case where a general law could not be made to apply. In that view of the subject we upheld the act organizing and establishing the Criminal Court of St. Louis, because necessary and highly advantageous in a city, though it would be useless and inapplicable to the State generally. (*State v. Ebert*, 40 Mo. 186.) But the enumeration of prohibited acts contained in the twenty-seventh section shows clearly what was in the mind of the convention when the section was passed—that it was intended to apply to acts, persons, and localities specifically.

Special statutes relate to certain individual classes or particular localities. Had the act applied to a certain specified town or a single corporation, it would have been special; but such is not the case. It is co-extensive with the State, and its influence is felt in every county and almost every township. It is conceded that it does not include in its operation every individual nor extend to all the territory, but that is not required. It is as general as is consistent with its scope and design, and no law more general in its nature could be framed to effectuate and carry out the object in view. This is also a sufficient answer to the point raised, that the act is in opposition to the fourth section of the eighth article of the constitution.

It has been insisted at the bar, in argument, that under the provisions of this law the town loaned its credit without the assent of two-thirds of the qualified voters, as prescribed by the constitution. But this is so obviously a mistake that it is not deserving of any particular consideration. The fourteenth section of the eleventh article of the constitution provides that the general assembly shall not authorize any county, city, or town to become a stockholder in, or loan its credit to, any company, association, or corporation, unless two-thirds of the qualified voters of such county, city, or town, at a regular or special election to be held therein, shall assent thereto.

This section has exclusive reference to municipal corporations becoming stockholders and loaning their credit to private companies, associations, and corporations, and is incapable of being in any manner tortured so as to be applicable to the present case.

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Upon a full view of the whole case, I have failed to see any reasonable objection to the validity of the law, and I accordingly advise an affirmance.

Judgment affirmed. The other judges concur.

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ST. LOUIS AND ST. JOSEPH RAILROAD COMPANY, Appellant, v.  
SAMUEL A. RICHARDSON, Respondent.

1. *Eminent domain—Land taken for railroads—Damages, assessment of.—Construction of statute.*—Under the act for the appropriation and valuation of land taken for telegraph and other purposes (Wagn. Stat. 327-8, §§ 3, 4), unless the court is clearly satisfied that the commissioners appointed to assess damages have erred in the principles upon which they have made their appraisals, their report should not be disturbed by review or a new appraisalment.
2. *Eminent domain—Land taken for railroads—Benefits, assessment of, how estimated.*—The settled law of this State is that in assessment of damages for land taken for railroad purposes (Wagn. Stat. 327-8, §§ 3, 4) the benefit derived which is to be taken into account is the direct and peculiar benefit resulting to the land in particular—not the general benefit accruing to it in common with other land which is enhanced in value by the building of the road.

*Appeal from Fifth District Court.*

*Hall & Oliver*, for appellant, cited 1 Hill. on Rem. for Torts, 297, § 3; 43 Penn. 495; 2 Gray, 107; 11 Cush. 203; 47 Penn. 428; 1 Redf. on Railw. 262-3; 3 Allen, 141.

*Richardson*, and *H. M. & A. H. Vories*, for respondent, cited *Newby v. Platte County*, 25 Mo. 258; *Troy & Boston R.R. v. Lee*, 13 Barb. 169; same *v. Turnpike Co.*, 16 Barb. 100; 1 Redf. on Railw. 264, note 21; *id.* 268, and notes; 6 Ohio St. 182; 25 Mo. 544.

WAGNER, Judge, delivered the opinion of the court

This was a proceeding commenced in the Ray Circuit Court by plaintiff, to condemn, for its own use and for the purpose of constructing its road-bed, a strip of land belonging to the

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defendant. The petition, in accordance with the provisions of the statute, prayed the court to appoint three disinterested householders—citizens of the county—to view the land and assess the damages which the defendant would sustain in consequence of the appropriation and condemnation of the land for the plaintiff's road-bed. The commissioners were duly appointed, proceeded to the discharge of their duty, and returned their report into court, in which they assessed the defendant's damages at \$900. The plaintiff then moved the court to set aside the award of the commissioners and the assessment of damages, and as grounds therefor alleged: first, that the damages assessed were excessive; second, that the commissioners did not take into consideration the advantages and disadvantages which would accrue to the defendant by reason of the construction of the railroad; third, that the land of the defendant would be of greater value after the construction of the road through the same than it was before.

This motion the court overruled and gave judgment on the report, which judgment was affirmed in the District Court. Upon the hearing of the motion the plaintiff introduced several witnesses, who testified that they were well acquainted with the defendant's land, over which the road was located, and that they knew in what manner the road passed through the land; that the land was worth more after the location of the road than it was before the road was located, and would sell for more.

The law under which the proceedings were had declares that after the proper steps are taken, the court shall appoint three disinterested commissioners—residents of the county in which the real estate, or a part thereof, is situated—to assess the damages which the owners may sustain by reason of the appropriation, who, after having viewed the land, shall forthwith return, under oath, to the clerk of the court, the assessment of damages, setting forth the amount. After the filing of the report, it may be reviewed in the court in which the proceedings were had, on written exceptions filed by either party within ten days after the filing of the report; and the court is thus authorized to make such order as right and justice may require, and may order



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a new appraisement for good cause shown. (1 Wagn. Stat. 327-8, §§ 3, 4.)

The section empowering the court to review the report or order a new appraisement, is not very definite or clear, and does not indicate with any precision what should be deemed a sufficient cause for calling forth the revisory power. It must be observed that the commissioners do not act like an ordinary judicial tribunal. Their judgment is not made up exclusively upon evidence submitted to them. They may arrive at their conclusions upon the proof and allegations of the parties; and in addition thereto they are required to view the premises, and have the advantage of an actual personal inspection. They are generally selected on account of their capacity and fitness, and are required to be disinterested; and unless the court is clearly satisfied that they have erred in the principles upon which they have made their appraisal, there is nothing for review, and their report should not be disturbed. The testimony of witnesses as to value, whilst it is admissible, is not controlling. It is simply their opinion, and certainly can not be allowed to have greater weight than the deliberate official acts of the commissioners, who have equal, if not superior, advantages for forming a correct judgment. Besides, their evidence in this case is not satisfactory on this question. It is not shown upon what theory their opinion is based—whether the enhancement in value that they speak of was peculiar and special to the property of the defendant on account of the railroad running through it, or whether it was an increase defendant's property shared in common with other property in the neighborhood.

The settled law of this State is that the benefit derived, which is to be taken into account in the assessment of damages, is the direct and peculiar benefit resulting to the land in particular, and not the general benefit accruing to it in common with other land which is enhanced in value by the building of the road. (*Pacific Railw. v. Chrystal*, 25 Mo. 544; *Newby v. Platte County*, *id.* 258; *Little Miami R.R. Co. v. Collett*, 6 Ohio St. 182.) Other States have laid down different rules, and have involved the subject in a good deal of perplexity; but the law, as heretofore

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declared in this court, seems to be just, of easy application, and should be adhered to. I have failed to see any error in the record, and think the judgment should be affirmed.

Judgment affirmed. The other judges concur.

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WILLIAM SNOOKS, Respondent, *v.* THE CITY OF ST. JOSEPH,  
Appellant.

1. Smith *et al.* v. City of St. Joseph, *ante*, p. 449, affirmed.

*Appeal from Fifth District Court.*

Grubb, Hall & Oliver, for appellant.

M. L. Harrington, for respondent.

WAGNER, Judge, delivered the opinion of the court.

Respondent recovered a judgment against the city of St. Joseph for injuries sustained by him in falling into a hole or gully in one of the public streets of the city, which was allowed to remain in an exposed and dangerous condition. The evidence tended to prove the allegations in the petition, and the instructions of the court were similar to those given in the case of Smith and wife against the city of St. Joseph, *ante*, p. 449. The principles adjudged in that case are decisive of this, and it is unnecessary to re-state them.

Judgment affirmed. The other judges concur.

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HENRY B. IBA, Appellant, *v.* THE HANNIBAL AND ST. JOSEPH  
RAILROAD COMPANY, Respondent.

1. *Justice's court*—*Statement in, must show what.*—A statement of facts constituting a cause of action in a justice's court is sufficient if it advise the opposite party of the nature of the claim, and be sufficiently specific to bar another action.
2. *Damages*—*Railroad companies*—*Accident in town limits*—*Uninclosed fields*—*Suspended and dissolved corporations.*—In an action against a rail-

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road company for the killing of a cow on its track, where the proof showed that the accident occurred within the limits of a town corporation, as shown by the paper plat of the town, but in fact away from any street, and in an open prairie, and in a case where the town corporation had been dissolved or suspended, the railroad company would be responsible, under the act of 1855 (Wagn. Stat. 310-11, § 43), for actual damages arising from failure to fence its track at the point of the accident, without proof of other negligence. The same action might also be brought under section 5, p. 520, Wagn. Stat.

3. *Corporations aggregate liable for misfeasance or neglect at common law, although liable to penal action under statute for same offense.*—Corporations aggregate are, in general, liable for misfeasance and non-feasance, whether that liability be expressly provided for or not. And where the statute creates a special duty on its part—such as the fencing of uninclosed prairie land, etc., by railroad companies—for the neglect of which a common-law action would lie, that action is not forbidden by the fact merely that an extraordinary liability in the nature of a penalty is also provided by the statute (Wagn. Stat. 310-11, § 43). The latter remedy is only cumulative.
4. *Justice's court—Jurisdiction—Venue must appear in transcript.*—In actions for injuries to cattle, etc., the justice's jurisdiction is confined to such as arise within their respective township; and when the transcript fails to show that the injury happened in the township where the justice held his court, the appeal must be dismissed.

*Appeal from Fifth District Court.*

*Jones & Herriford*, for appellant.

I. The statement was sufficient. (*Burt v. Warne*, 31 Mo. 296; *Wathen v. Farr*, 8 Mo. 327; *Pearson v. Inlow*, 20 Mo. 322; *Early v. Fleming*, 16 Mo. 154.)

II. The place where the cow was killed is admitted to have been open, uninclosed prairie land, and not at the crossing of any street. In such a case the railroad is not only liable to double damages, but it is unnecessary to show negligence. (*Gorham v. Pacific R.R. Co.*, 26 Mo. 442; *Powell v. Hann. & St. Jo. R.R.*, 35 Mo. 457; *Price v. Hann. & St. Jo. R.R. Co.*, 35 Mo. 188.)

*Hall & Oliver*, for respondent.

The statement on which suit is brought is fatally defective. It does not show that the cow was killed in the justice's jurisdiction, nor does it allege want of fences or negligence.

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BLISS, Judge, delivered the opinion of the court.

The plaintiff commenced his suit before a justice of the peace, and filed the following statement of his cause of action:

“EASTON, Mo., February 15, 1868.

“THE HANNIBAL AND ST. JOSEPH R.R. CO., to HENRY B. IBA, Dr., for damages amounting to sixty-five dollars, for a cow killed on railroad, on or about the 7th day of November, 1867, \$65.

HENRY B. IBA.”

The defendant appeared, and, without objecting to the statement, the case went to trial. The plaintiff recovered judgment for sixty-five dollars—“double the valuation of the cow”—and defendant appealed. The Circuit Court gave judgment for only the actual value of the cow, which was reversed in the District Court. The first objection to the judgment is based upon the alleged defects of plaintiff’s statement. The statute (Wagn. Stat. 814, § 13) requires “a statement of the facts constituting the cause of action;” but the same completeness requisite to a petition in the Circuit Court has never been required. It is sufficient if it advise the opposite party of the nature of the claim, and be sufficiently specific to be a bar to another action. This statement would be clearly defective as an original petition in a court of record, both in form and substance, and probably would not sustain a verdict. (*West v. Hann. & St. Jo. R.R. Co.*, 34 Mo. 177; *Dyer v. Pacific R.R.*, *id.* 127.) But before a justice of the peace it is not necessary to set out in writing all the facts which must be proved. Until 1855, no statement at all was required in cases like the one at bar—section 13, p. 814, Wagn. Stat., being then enacted. In *Burt v. Warne*, 31 Mo. 296, the plaintiff sued for damages to a building, making his statement in the form of a simple account, without any averment showing force or negligence, or any other fact that would charge the defendant, and the court held it sufficient. In *Coughlan v. Lyons*, 24 Mo. 533, the action was for damages for a wrongful seizure of plaintiff’s property, in attachment against a third person; and the statement in the form of a simple account, without any allegation of tort, was held sufficient. The opinion could have been

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sustained upon the ground that the plaintiff had a right to waive the tort and sue for the property; but it was founded as well upon the liberality with which proceedings before justices of the peace should be regarded. The case of *Walthen v. Farr*, 8 Mo. 322, is not inconsistent with the other cases. To the claim that practical injustice might arise from so meager a statement, it is only necessary to refer to Wagn. Stat. 822, § 12, by which the plaintiff is required to make a full verbal statement of the nature of his demand before proceeding to trial. It would be better if the original paper should clearly and simply set forth the facts constituting the demand according to the forms in Judge Kelley's *New Treatise*; but a more imperfect statement has never been held to be error. Justices' courts are popular tribunals, before which ordinary disputes can be adjusted without the aid of attorneys; and it would defeat the end of their organization if the rules of practice and pleading found necessary in courts of record were applied to their proceedings.

The defendant complains of the declarations of law in the Circuit Court, in which the court held: first, that the plaintiff was not entitled to the double damages given by the statute, but only to that actually suffered; second, that he was entitled to such damage notwithstanding that actual negligence, other than neglect to build the fence, was not proved; third, that the defendant is not required to fence the road where it passes through a town or village.

Of the first and third propositions the defendant can not complain, and the plaintiff does not; and it is only necessary to consider the second and its application. It appears that the plaintiff's cow was killed by defendant's cars on that part of its track running through the open prairie near the village of Easton, and within the paper plat of the town, as filed in the county recorder's office; but there were no streets in fact near where the accident happened. It also appears that there had been no election of officers and no actual organization since 1861. The court, in order to make its judgment consistent with its formal declarations of law, must also have held, first, that the town of Easton was not a corporation *de facto*, being dissolved and suspended; and

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second, that if a railroad company shall fail to fence its track according to law, it is responsible for the actual damages arising from such neglect, without proof of other negligence, and without prosecution for double damages.

The court was clearly right in holding that the obligation to fence could not extend to the track within towns and cities; for though the streets be not actually opened, they are liable to be at any day, when the fence would be found an obstruction to crossing. (*Meyer v. N. Mo. R.R. Co.*, 35 Mo. 352.) But it was also right in refusing to excuse the defendant in the case at bar. If any streets had been actually laid across its track, they only existed on paper, and there was no power to open them. The record does not advise as to whether the corporation was actually dissolved or only suspended.

The general rule is that a corporation is dissolved when it has lost its capacity to act or sustain itself by a new election of officers. (*Ang. & Ames on Corp.*, ch. 22, § 3.) Nor does it greatly matter. The act of 1865 for the first time required the track to be fenced along "uninclosed prairie lands." The corporation of Easton had been at least suspended for several years, and the possibility that it might be revived at some future day was altogether too remote to excuse the performance of a plain duty. Upon the second point, the court considered the claim as one for actual damages, and not for the liability imposed by the statute; and as the plaintiff does not object to this view, it is immaterial whether his statement was broad enough to embrace the latter. The first paragraph of the section (*Wagn. Stat.* 310-11, § 43) positively requires the corporation to fence. If the section had stopped there, no doubt could reasonably exist as to the liability, without averment or proof of other negligence than the neglect to fence. A *quasi* corporation, like a county or township, is not liable for the neglect of its officers, as in failing to repair a road or bridge, unless expressly made so by statute, and then only liable according to the terms of the statute. (*Mower v. Leicester*, 9 Mass. 247; *Bartlett v. Crozier*, 17 Johns. 439.) But corporations aggregate are in general, like individuals, liable for misfeasance and non-feasance, whether that liability be expressly provided for or not. (*Riddle v. Proprietors, etc.*,



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7 Mass. 186; Chestnut Hill, etc., v. Rutter, 4 S. & R., Penn., 6; Townshend v. Turnpike Co., 6 Johns 90.) This general liability is nowhere now disputed; but it may be claimed that when the statute has enacted a specific liability, the corporation is exonerated from any other. It is sometimes so. If there would be no general liability for neglect of the duty imposed, unless enacted by statute, then it could only be held for the statutory liability. But when the statute creates a special duty, for the neglect of which a common-law action would lie, that action is not forbidden by the fact merely that an extraordinary liability in the nature of a penalty is also provided. The latter is only cumulative. The liability for the greater shall not of itself exclude the liability for the less, provided the latter could exist without the former; nor shall the greater include the less, if the less is wholly dependent upon the greater. The statute under consideration imposes the obligation to fence. It dispenses with any other proof of negligence if the fence is not built, and it compensates the sufferer with double the loss. If nothing were said about damages, the defendant would be liable for the actual loss; so, I imagine, he would be liable if nothing were said about the evidence. The obligation of itself creates the liability. The right to double compensation may be followed or abandoned. It neither creates nor supersedes the right. That would exist without it.

Parsons, J., in *Riddle v. Proprietors, etc.*, *supra*, says: "For the proprietors, in support of their motion (in arrest), a reference was made to the several statutes creating our turnpike corporations, in which an action is given to any person specially injured by a neglect to repair the road. This provision was cumulative *ex majori cautela*, by the framers of the bills," etc.

*Morris v. Androscoggin R.R. Co.*, 39 Maine, 273, was an action of case for damages to plaintiff's horse escaping from plaintiff's inclosure through a gap in the fence dividing it from the railroad. Defendant's charter, and also a general statute, imposed upon it an obligation to maintain fences, and provided a forfeiture to the owner of the land for its neglect. The court sustained the common-law action notwithstanding the statutory liability.

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So, the case of *Calvert v. The Hann. & St. Jo. R.R. Co.*, 34 Mo. 242, was a common-law action for killing stock, and the petition was held to be sufficient. The judgment was, however, reversed from failure of evidence either of ordinary negligence or of a neglect to fence. The case again came back, and is reported in 38 Mo. 467, where the judgment was sustained upon proof alone that the injury did not occur at a highway crossing, and that the road was not fenced. The action in that case was not brought for double damages, but the plaintiff relied upon section 5 of the chapter of damages (Wagn. Stat. 520); and the Circuit Court might have treated the case at bar as prosecuted under the same chapter, and, under the authority of *Calvert v. Hann. & St. Jo. R.R. Co.*, sustained the statement filed with the justice, though regarding it as in the nature of a common-law petition.

There is one fatal objection, however, to this record. It has always been held that the proceedings of inferior courts should show jurisdiction; and though it were better in this case that it appear in the statement of the cause of action, yet if it were shown in the writ or transcript, it would suffice. In actions for injuries to cattle, etc., the justice's jurisdiction is confined to such as arise "within their respective townships," thus making it a local action. Though it might perhaps be gathered from the evidence that the injury occurred in Marion township, yet the record proper fails to show the fact; and on the authority of *The State v. Metzger*, 26 Mo. 65, and of *Hausberger v. Pacific R.R. Co.*, *supra*, we must affirm the judgment of the District Court, reversing that of the Circuit Court. The other judges concur.

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JOHN S. WILLIAMS, Defendant in Error, *v.* WM. T. BROWNING,  
Plaintiff in Error.

1. *Justice's court*—*Suit for damages*—*Obstruction of drain*.—A suit before a justice simply to recover damages for obstructing plaintiff's drain, does not involve an investigation of title to real estate.
2. *Practice, civil*—*Motion to dismiss*—*Failure to except, effect of*.—When no exceptions are taken to the action of the Circuit Court in overruling a motion to dismiss for want of due service of summons, its action in that behalf is not open to review in the Supreme Court.

*Error to Fifth District Court.*

*Dixon & Pollard*, for plaintiff in error.

The objection to the jurisdiction of the justice, made in the justice's court, and the Circuit Court and District Court, should have been sustained. (1 Hill. on Torts, 508, note *b*; 6 Hill, 342; 15 Ohio, 489.)

*Collier*, for defendant in error.

CURRIER, Judge, delivered the opinion of the court.

This suit was brought before a justice of the peace to recover twenty-five dollars damages for obstructing the plaintiff's drain, whereby, it is alleged, the plaintiff's premises were injured by the accumulation of water thereon—its outward flow being interrupted by the obstructions in said drain. It is objected that the subject-matter of the suit was not within the jurisdiction of a justice; and that if it was, the justice failed to acquire jurisdiction of the defendant—the summons issued by the justice being claimed to be invalid. 1. The first objection rests upon the assumption that the suit involved an investigation of the title to real estate. This assumption is not supported by the facts appearing of record, and is therefore not sustainable. (See *Whalen v. Keith*, 35 Mo. 87.) 2. The second objection rests upon the fact that the justice's summons was issued and served only six days before the return day therein named; whereas the statute requires the issue and service of the summons, in such cases, fifteen days prior to the return day of the writ.

The defendant appeared before the justice and moved to dismiss. The motion was overruled and a trial had upon the merits. On appeal to the Circuit Court, the motion to dismiss was renewed, and was again overruled. No exception was taken to the action of the court in that respect, and the parties proceeded to try the cause upon its merits. As no exception was taken to the action of the court in overruling the motion to dismiss, its action in that behalf is not open for review in this court. It was

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quite competent for the party to abandon his objection to the summons and submit himself to the jurisdiction of the court.

The judgment of the District Court is affirmed. The other judges concur.

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WILLIAM T. BROWNING *et al.*, Plaintiffs in Error, *v.* DANIEL WALBRUN *et al.*, Defendants in Error.

I. *Frauds, statute of—Evidence of parol lease inadmissible, under petition counting on written instrument.*—In an action of damages for breach of a lease, where the petition counted upon a written lease when there was no such lease, but only a contract to pay money in consideration of a lease, it was incompetent to offer in support of that count either a parol lease or the written promise of defendant to pay money; and the court committed no error in ruling them out. But had the petition set out a parol lease, it would have been competent to prove it as well as the written agreement. In such case the agreement under which defendant was sought to be charged under the statute of frauds was the written obligation to pay rents.

*Error to Fifth District Court.*

*McFerran & Mansur*, for plaintiffs in error.

The statute of frauds has no application in this case. The plaintiffs in error, by suing upon the agreement filed as the foundation of the suit, did an act that bound them; and the defendants in error signed the agreement, and therefore could not plead the statute. (*Ivory v. Murphy*, 36 Mo. 542.)

*Richardson and Hall*, for defendants in error.

I. The petition counts upon an instrument of writing, and the plaintiff, if he recovers at all, must recover on the contract declared on; and that being a contract in writing, the writing itself must be produced. (*Harris v. Hann. & St. Jo. R.R. Co.*, 38 Mo. 307; *Perry v. Barrett*, 18 Mo. 143.)

II. No written evidence having been given or offered to prove the contract declared on, oral evidence, no matter what it might be, would have been wholly immaterial, as no recovery could have

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been had thereon. (Penseneau v. Penseneau, 22 Mo. 27; Robinson v. Rice, 20 Mo. 227; Dieckman v. McCormick, 24 Mo. 596; Duncan v. Fisher, 18 Mo. 403; Beck v. Ferran, 19 Mo. 30; Smith v. Best, 42 Mo. 185.)

BLISS, Judge, delivered the opinion of the court.

The petition alleges that the plaintiffs leased to defendants, "by a written agreement herewith filed, dated," etc., "a certain store-room," etc., "for the term of three years, commencing," etc., "at the rent of \$3,600, payable monthly in advance, which said sum the defendants agreed to pay to the plaintiffs." It further alleges that the plaintiffs "were ready and willing to perform all the conditions of said agreement on their part," but that "defendants have failed to pay the first installment of rent, refused to receive the store-room, discharged the plaintiff from the performance of his contract, broke and put an end to their said promise and agreement," and asks for damages for the breaches of the agreement.

The answer denied the lease as described in the petition, but admitted the execution of the paper filed, and sought to avoid the obligation created by that paper by alleging that the defendants could not obtain possession of the store-room. The following is a copy of the paper filed with and referred to in the petition:

"CHILLICOTHE, Mo., June 30, 1868.

"This is to certify that we agree to pay Browning, Henry & Odle for the rent of the corner store-room, for the term of three years, thirty-six hundred dollars, payable monthly in advance, and the rent commences on the first day of July, 1868; and we further agree not to put heavy groceries in said room to any great extent," etc.

"DANIEL WALBRUN & Co."

Upon the trial, the plaintiff offered said paper in evidence to prove the lease. Objection was made for variance. The objection was sustained and the paper withdrawn. They next offered parol evidence of the lease, which was objected to, and the objection was sustained, and the plaintiff went out of court.

The point which seems by the record to have been chiefly considered by the Circuit Court pertains to the validity of the lease

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as affected by the statute of frauds. The paper filed with the petition is not a written lease, but simply an obligation to pay rent in consideration of a lease. Had the petition set out a parol lease as the consideration for the agreement, it would have been competent to prove it as well as the written agreement; for it is well settled that the statute of frauds is only available by the party who comes within its purview—that is, the party who has failed to sign the obligation with which he is sought to be charged. The statute does not declare such contracts void, but only provides that no action shall be brought to charge one upon them unless the agreement shall be signed by the party to be charged therewith. The defendants signed an agreement pertaining to the sale of lands, and they can not defend under the statute, and the action is not brought to charge the parties who failed to contract in writing. Affirming the contract themselves, they have a right to enforce it against the other party. (*McGowan v. West*, 7 Mo. 569; *Farrar v. Patton*, 20 Mo. 81; *Ivory v. Murphy*, 36 Mo. 534.) So the reason stated in the record for rejecting the evidence was not a sound one. So far as the statute is concerned, both the writing and the testimony were competent.

The difficulty all lies in the petition. It counts upon a written lease when there was no such lease, but only a contract to pay money for the consideration expressed. The suit should have been upon that contract, and if the defendants sought to avoid it by denying the consideration, or by pleading a want of it, it would have been competent to show a parol lease to sustain the promise. But inasmuch as the plaintiff counted upon a written lease, and asked for damages for not complying with the terms of that lease—for the unusual manner of stating the breaches means that or nothing—it was incompetent to offer in support of that count either a parol lease or the written promise of defendants to pay money, and the court committed no error in ruling them out. It is true, the plaintiffs, under the statute of *jeofails*, might have amended their petition, but they did not ask the privilege of doing so, and must abide the result.

The judgment of the District Court, affirming that of the Circuit Court, is affirmed. The other judges concur.



JAMES J. LAWSON AND AMI LAWSON, Plaintiffs in Error, v.  
EDWARD GUDGEL, Defendant in Error.

1. *Bills and notes — Payment of one note by another — Satisfaction and accord — Possession.*—A. was owner of a note made by B., deceased. The wife of A. was one of the heirs of B. The remaining heirs executed to A. their joint note for the amount named in that of B., less the proportion due from the wife of A. In a suit against the surety of B. on the note, *held*, that a receipt by A. of the note given by the heirs, unconditionally, and in full payment of the note of B., and a delivery of the latter to a surety of B. as paid, was a payment and satisfaction of the same; and that possession of the note by the surety after maturity was *prima facie* evidence of its payment. .

*Error to Fifth District Court.*

*Dixon, Collier & Broadbuss*, for plaintiffs in error, cited 2 Greene, Iowa, 553; 20 Wis. 98; 19 Wend. 409; 6 Johns. 37; 5 East, 294; 3 Monr. 303; 10 U. S. Dig. 7, § 7; 11 U. S. Dig. 7, § 2; 20 Cow. 559; 20 Johns. 77; 8 Johns. 389; 15 Johns. 247; 8 Cow. 78; 19 Johns. 295; 5 Hill, 450; 17 Johns. 169; 28 Ind. 97; 1 Ind. 310; 5 Black, 71; 4 Greene, 544; 27 Maine, 370; 26 Maine, 88; 2 Metc. 285; 9 Cush. 150; Chit. on Bills, 524; 15 Johns. 248; 1 Hill, 516.

*Hall & Oliver*, for defendant in error, cited Edw. on Bills and Prom. Notes, 2d ed., 546; Boyd v. Hitchcock, 20 N. Y. 76; Sheely v. Mandeville, etc., 6 Cranch, 253; Appleton v. Kennon, 19 Mo. 640; Sto. on Prom. Notes, § 404; St. John v. Purdy, 1 Sandf. 9; Willard v. German, 1 Sandf. 50; Southwick v. Sax, 9 Wend. 122; New York State Bank v. Fletcher, 5 Wend. 85-7; Arnold v. Camp, 12 Johns. 409; Frisby v. Larned, 21 Wend. 450; Cole v. Sackett, 1 Hill, 516.

BLISS, Judge, delivered the opinion of the court.

The plaintiffs brought suit upon a promissory note executed to them by defendant and one John T. Gudgel, deceased, and allege that the note is in the hands of defendant, but is unpaid. The defendant answers that he was surety upon the instrument for said John T. Gudgel; that it became the sole property of James

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J. Lawson, one of the payees, whose wife was one of the heirs of said John T. Gudgel; and that it was paid and satisfied in the following manner: the said heirs had, without administration, divided the estate of said John T. Gudgel among themselves, and, that they might not be compelled to pay back to an administrator the amount so divided, agreed to pay said note, and accordingly executed to said James J. Lawson their joint note for the full amount due upon the note in suit, less the proportion to be paid by the wife of said James J. Lawson, which joint note the said James J. Lawson received in full satisfaction of the note in suit, and directed his agent, who had it in possession, to deliver it up to defendant, which was done. The plaintiff denied these allegations, and a verdict was obtained and a judgment rendered for defendant, which was affirmed in the District Court. Upon the trial, the court gave a large number of instructions to the jury, embodying the same questions in different forms; but the points embodied in them were substantially as follows: The court held, first, that a receipt by the plaintiffs of a promissory note executed by the heirs of John T. Gudgel, unconditionally, and in full payment of the note in suit, and a delivery of the latter note, by order of the plaintiffs, to the defendant, as paid, was a payment and satisfaction of the same. Second, that the possession of the note by the maker was *prima facie* evidence of its payment. It seems to us there can be no doubt whatever as to the correctness of these positions. The plaintiffs make many objections to them, in their applications to the case, among which are, first, that the answer does not show a good accord and satisfaction, because the defendant was not a party to it. This is a strange objection when we consider that it does show that the defendant was but a surety upon the instrument, and that the adjustment was made, as it should have been made, by the heirs of the principal, who, by appropriating the property of the estate, were under obligation so far to provide for its debts. Second and third, the plaintiffs object to the instructions because there was no consideration for securing the new note, and it was for a less amount than the one in suit. I do not know that I fully understand what the plaintiffs meant by

consideration; but if they mean that the new note was without consideration, and therefore a *nude pact*, they are clearly in error; for, as we have seen, its makers performed but a plain duty in providing for the debts of the ancestor out of funds received from him; and if the creditor chose to waive the ordinary process to compel them to refund and take a promissory note, no one has a right to complain, and the obligation is clearly valid. And as to the amount of the note so taken, the answer and evidence show that it was for precisely the true amount, a deduction only being made of the proportion which the holder of the note was under obligation to pay. Fourth, the plaintiffs also object to the instruction that the possession of the note by its maker was *prima facie* evidence of its payment. If a promissory note were found, after due, in the hands of the maker, the natural inference would be that he had paid it. It was his duty to pay it when due; and it was not reasonable to suppose that the holder would surrender it until it was satisfied. (2 Greenl. Ev., § 527.) There was no error in this instruction, notwithstanding the answer; for if it came into the maker's hands improperly, it was the duty of the plaintiff to show it. Fifth, the real defense seems to have been that the note given by the heirs of Gudgel in satisfaction of the one in suit, was made and delivered upon a condition which has not been performed. But all the questions relating to this alleged condition were fairly submitted to the jury, and decided against the plaintiffs. Sixth, the plaintiff asked the court to give an instruction, which was refused, but was modified, and given as modified; and to this refusal and modification exception was taken. But the record fails to show how the instruction was modified, and we are unable to decide whether it would have been correct to give it as desired by the plaintiff.

From a careful examination of the record, and the suggestions of counsel, it seems to us that the case was fairly tried, and that the judgment was correct. The other judges concurring, it will therefore be affirmed.

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St. Louis and St. Joseph R.R. Co. v. Robinson.

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ST. LOUIS AND ST. JOSEPH RAILROAD COMPANY, Appellant, *v.*  
GEORGE E. ROBINSON, Respondent.

1. St. Louis and St. Joseph Railroad Company *v.* Richardson, *ante*, p. 466, affirmed.

*Dunn & Orrick*, and *Hall & Oliver*, for appellant.

*Vories & Vories*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

This case was argued and submitted in connection with the case of St. Louis and St. Joseph Railroad Company *v.* Richardson, and the facts and principles are the same.

For the reasons therein given, the judgment of the District Court will be affirmed. The other judges concur.

[END OF FEBRUARY TERM.]

CASES  
ARGUED AND DETERMINED  
IN  
THE SUPREME COURT  
OF  
THE STATE OF MISSOURI,  
MARCH TERM, 1870, AT ST. LOUIS.

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PETER J. HURCK and WM. M. PRICE, Defendants in Error, v.  
GREENE ERSKINE, Plaintiff in Error.

1. *Bills and notes secured by deed of trust—Priority of payment, although all become due on default of payment on one note.*—Although by the express terms of a deed of trust the notes secured all became due upon the first default in payment, it did not follow that they stood on an equality in the distribution of the fund. Without an express agreement to that effect, the priority of claims in such case will not be impaired or interfered with. (Mitchell v. Ladew, 36 Mo. 526; Mason v. Barnard, *id.* 384, affirmed.)

*Error to St. Louis Circuit Cou*

*Gantt*, for plaintiff in error.

When the deed contains a contract or provision changing the order of payment, such contract or provision will be enforced by the courts. (Ellis, Adm'r of Lamme, v. Lamme, 42 Mo. 154; Bank of U. S. v. Singer, 13 Ohio, 240; Morgan v. Martin, 32 Mo. 438; Mason v. Barnard, 36 Mo. 384; Mitchell v. Ladew, *id.* 526; Thompson v. Field, 38 Mo. 320.) These provisions,

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in the deed under consideration, place all the notes upon an equal footing so far as the security furnished by the deed is concerned; and upon default in the payment of the first note, the trustee was compelled to treat them as being on an equal footing. (See authorities above cited.)

*Harding & Crane*, for defendants in error.

WAGNER, Judge, delivered the opinion of the court.

In this case Hurck, the plaintiff, was the trustee in a deed of trust executed by Frank Erskine and G. W. Rucker, to secure the payment of three several promissory notes, each for \$6,250, to Wm. M. Price, due in one, two, and three years, respectively. Before maturity, Price, the payee, sold and assigned the first note to Greene Erskine, one of the defendants in this suit. The note was not paid when it became due, and no steps were then taken to enforce collection. After several months had elapsed, Greene Erskine desired Hurck, the trustee, to proceed and sell the property for the purpose of satisfying the debt. Hurck waited till the second note became due, and then sold the property, Price becoming the purchaser, for more than enough to pay off the first two notes, but less than enough to satisfy all three.

After the usual granting clause, the deed of trust contained the following provision: "Now, if said notes and interest, and every part thereof, be well and truly paid when due, then this deed shall be void, and the property hereinbefore conveyed shall be released at the cost of said parties of the first part; but if said notes or interest, or any part thereof, be not well and truly paid when due, then all of said notes shall become forthwith due and payable, whether due on their face or not."

Erskine claimed that his note first falling due, he was entitled to full satisfaction out of the proceeds, whilst Price contended that he was only entitled to an equal distributive share. In this contention the trustee brought his suit to compel the defendants to interplead and have their rights adjusted by the court. The Circuit Court adjudged a *pro rata* distribution, and decreed that an equal third be applied to each note respectively. Erskine excepted and sued out his writ of error.



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In *Mitchell v. Ladew*, 36 Mo. 526, it was held that where a deed of trust secures several notes maturing at different dates, the notes shall be paid and satisfied in the order of priority in which they mature, notwithstanding they may be all due at the time the sale is made. The question was again considered and affirmed in *Thompson v. Field*, 38 Mo. 320.

But it was argued here that by the express terms of the deed of trust the notes all became due upon the first default in payment, and therefore they stood on an equality in the distribution of the fund. We do not concur in this view. A similar question arose in the case of *Mason v. Barnard*, 36 Mo. 384. There, by the terms of the deed of trust, the trustee was empowered to sell all the property when the first note fell due; and they were all to be considered, at the option of the person holding the same, to be matured upon the first default. On that occasion we said: "The reason for such a provision is obvious. Upon a sale of the whole property, if the purchase money exceeds the amount due on the first note, it would have to lie in the hands of the trustee without interest till the succeeding note matured, if no condition was made to the contrary; and the condition inserted to elect to consider them all due, was for the purpose of distributing the trust fund to all when the property was sold, but for that purpose only."

When a sale has to be resorted to and the property sold, on account of default in the payment of any of the notes, it is advisable and advantageous that they should all be considered due, that a final adjustment should be made, and the parties entitled thereto should receive their money instead of suffering it to lie idle in the hands of the trustee. But without an express agreement to that effect, the priority of the claims will not be impaired or interfered with.

*Ellis, Adm'r, v. Lamme*, 42 Mo. 154, has been cited as an authority to sustain the judgment of the court below. But that case was decided upon a construction of the agreement entered into between the parties, and has no analogy to the one we are now considering. The deed there was given to secure the payment of two promissory notes made and executed by Lamme to

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the plaintiff. The first was made by Lamme alone, and was due twelve months after date; the other was executed by Lamme, with defendant and Rollins as securities, and due and payable two years after date. By agreement of parties, and by the express terms of the deed, the proceeds of the property were to be appropriated, first, to the costs and expenses of executing the trust; second, to the payment of the note specified on which defendant and Rollins were securities; and third, to the payment of the note due to the plaintiff and executed by Lamme alone. In distinguishing that case from *Mitchell v. Ladew*, it was declared that the principle of law therein asserted would apply where there was no special agreement to the contrary between the parties. But as by positive contract the parties had agreed that the trust fund should be applied to the payment of the notes transversely, and the second note, on which there was security, was to be satisfied first, that agreement was binding, and should therefore prevail. The case is therefore no authority for the position contended for, and wholly fails to sustain the judgment.

The principles announced in *Mitchell v. Ladew*, and *Mason v. Barnard*, are, we think, decisive of the case at bar; and the result is that the judgment of the Circuit Court must be reversed and the cause remanded.

Reversed and remanded. The other judges concur.

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JOHN GILLHAM, Respondent, v. HENRY B. KERONE, Appellant.

1. *Replevin—Execution against copartnership effects, under judgment against insolvent partner—Replevin by solvent partner against sheriff's judgment, for value of property or return thereof.*—Defendant in a replevin suit claimed a lien on the replevied property as constable, by virtue of a levy upon it under a judgment against plaintiff's co-partner. The property was a portion of the partnership assets. In such a case the constable's interest in the property was limited to the execution debtor's interest in the partnership effects, and plaintiff was entitled to show that the interest of the latter was merely nominal and of no value. In these suits, when plaintiff gives bond and takes the property, the jury should find a verdict for defendant for the value of his interest in the property, nominal damages and costs, or for a return of the property, at the election of defendant. (Wagn. Stat. 1026, § 12.) But plaintiff might, by paying off the amount of the lien, retain the property, and defendant would have no alternative but to accept the money if seasonably tendered.

*Appeal from St. Louis Circuit Court.*

*Woerner & Kehr*, for appellant.

I. The existence of the partnership and the rights of the parties under it can not be inquired into in an action at law by one of the partners against the creditor of his co-partner. (Collier on Part., § 298; *id.* 266, § 300; Smith's Merc. Law, 65.) Such evidence is secondary in its nature, and so unreliable that it ought for that reason alone to have been excluded.

II. The verdict was erroneous also for the reason that it refers the question of damages to the interest of defendant in the property replevied. If defendant had the right of possession at all, it was to the whole of it, and not to any fractional or undivided part; and if defendant was entitled to any damages, it was for the interference with this right of possession.

III. It was gross and palpable error to refuse the alternative judgment. (3 Blackst. Com. 396; 1 Bouv. Inst., § 676; 4 Bouv. Inst., §§ 357-9; Smith v. Williamson, 1 Har. & Johns. 147; Phillips v. Harris, 3 J. J. Marsh. 131-2; Smith v. Winston, 10 Mo. 299; Reed, Guardian, etc., v. Wilson & Garner, 13 Mo. 28; Wiley v. Maddox, 26 Mo. 77; Collins v. Hough, *id.* 149; Hohenthal v. Watson, 28 Mo. 360; Hansard v. Reed, 29 Mo. 472; Dilworth v. McKelvy, 30 Mo. 149; Baldwin v. Dillon, *id.* 429; Pope v. Jenkins, *id.* 528; Reeves v. Reeves, 33 Mo. 29; Fallon v. Manning, 35 Mo. 271; Frei v. Vogel, 40 Mo. 149 *et seq.*)

*Ewing & Holliday*, for respondent.

Where the plaintiff has an interest in the property seized, judgment should not be rendered in favor of the defendant for the return of the property or the payment of the entire value of the property, but the value of the interest of the defendant in the property should be assessed, and judgment should be rendered in favor of the defendant for the value so assessed, or the return of the property until such value be paid, at the option of the defendant. (Dilworth v. McKelvy, 30 Mo. 149; Fallon v. Manning, 35 Mo. 271; Frei v. Vogel, 40 Mo. 149.)

CURRIER, Judge, delivered the opinion of the court.

This is a replevin suit brought by the plaintiff, as general owner, against the defendant, who claims a lien upon the replevied property, in virtue of an execution levy upon it in a proceeding against the plaintiff's co-partner. The property was turned over to the plaintiff under the usual order in such cases. The main question for consideration arose at the trial upon objections to a portion of the plaintiff's testimony. It appeared that the defendant was an acting constable, and that, as such, he levied an execution against the plaintiff's co-partner upon the replevied property. This property constituted a portion of the partnership assets of a firm which was composed of the plaintiff and the execution debtor. The plaintiff offered evidence tending to show that the capital of the firm was contributed by himself exclusively; that the firm business had not been prosperous, and that the execution debtor's interest in the firm assets was merely nominal and of no value. The evidence was admitted over the defendant's objection, and the question is thus raised whether it was competent for the plaintiff, under the issues in the case, to show the facts proposed to be given in evidence. It was objected that the evidence was irrelevant to these issues, and that it was admissible only in a chancery proceeding by or against one or both of the parties composing the firm.

The ground assumed by the defendant in reference to the admissibility of the testimony is not in harmony with the spirit and tendency of the prior decisions of this court. In *Dilworth v. McKelvy*, 30 Mo. 149, it was definitely settled, and upon very mature consideration, that in a replevin suit by the general owner against a party having only a special interest, which is the situation of the defendant in the present suit, the recovery by the special owner against the general owner must be limited to the amount of the special owner's particular interest. In the case at bar, the defendant's special interest is limited to and can be no greater than was the interest of the execution debtor in the partnership effects. From these premises it would seem to follow as a matter of necessity that there must be some method of ascer-

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taining in the replevin suit itself the extent and value of the interest of the execution debtor in the firm assets. *Dilworth v. McKelvy* decides, without stating particularly the mode of proceeding, that in order to ascertain the true amount or value of the special owner's interest, it is competent, in the replevin proceedings, to state an account and settle the rights of the parties in a maritime general average. On this subject the court say: "It is not necessary, nor perhaps proper, that we should anticipate the action of the court on these questions in another trial; nor do we apprehend that there will be any serious difficulty in adjusting the rights of the parties on just principles. \* \* \* An application of the principles upon which general average has been allowed in cases of sea-going vessels, would make the case proved upon the trial a proper one for contribution." The case therefore decides that matters of general average are subject to investigation and adjustment in a replevin suit, notwithstanding the form of the issues and the provisions of the statute; and if a general average may be adjudicated in a replevin suit, why not also matters affecting the rights of the members of a commercial partnership, as they stand connected with the rights and interests of third parties? The former is quite as difficult a subject to deal with in a court of law as is the latter, and falls equally within the jurisdiction of a court of chancery. (1 *Sto. Eq. Jur.*, §§ 490-1.) All the objections urged against the evidence offered by the plaintiff in the case at bar, would apply with equal force to the evidence which it would be necessary to employ in passing on a case of general average under the rules and principles of the maritime law. The decision, therefore, in *Dilworth v. McKelvy* is a substantial answer to these objections. So far as any principle is involved, there is no substantial difference between the two cases—nothing on which to found a rule distinguishing in principle the one case from the other.

We are, moreover, quite satisfied with the law as expounded in the *Dilworth* case. It accomplishes the ends of substantial justice. The rule which permits the creditor of an insolvent member of a firm to seize upon the firm assets to satisfy a private indebtedness is ever liable to operate with harshness and severity upon the rights



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and interests of the solvent partners. Their rights are to be respected. It would be unjust to subject them to any unnecessary risk or inconvenience. The law gives them the privilege of regaining possession of the firm effects, when taken from them on account of an indebtedness in which they are not interested, by proceedings in replevin, and by giving the requisite replevin bond — the bond taking the place of the goods. But this privilege would be barren and worthless if the plaintiff in the replevin suit were bound at its conclusion to restore the property or pay the full amount of their insolvent associate's execution indebtedness, independently of the measure and extent of his interest in the firm. It would seem to be but the plainest justice to the solvent parties that the value of their insolvent associate's firm interest should be ascertained and settled before they should be required to contribute from the partnership effects to the payment of his private debts. Moreover, it is for the benefit of all parties that the value of such interest should be ascertained prior to a sale, in order that it may be made available for what it shall be found to be worth, if anything — thus averting a sacrifice of it at a sale made in ignorance of its value. This would alike protect and promote the just interests of the execution creditor and his debtor, and shield the solvent partners from oppression and injustice.

The defendant, however, makes the further objection that the testimony of the members of the firm, by whom the value of the execution debtor's supposed interest in the firm assets was sought to be shown, was secondary in its character, and insists that for that reason it ought to have been excluded. The execution debtor's interest in the firm, and its value or want of value, were facts to be proved like other facts. The partners were competent witnesses, and we see no objection to their testimony. If the defendant desired the production of the books and papers of the firm, he should have called for them. They were proper instruments of evidence, and it might be for the convenience of the parties and the court to have sent this branch of the case to referees to state an account. But this was not done.

Under the instructions of the court the jury found a verdict for the defendant, and assessed the value of the replevied prop-



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erty at \$200, and the defendant's (the insolvent partner's) interest therein at one cent. Upon this verdict the court rendered judgment in favor of the defendant, to recover of the plaintiff and his sureties one cent and costs. This judgment was erroneous, and for that reason must be reversed. It should have been for the value of the defendant's interest in the property, nominal damages and costs, or for a return of the property, at the election of the defendant, as the statute requires. (Wagn. Stat. 1026, § 12.) It would, nevertheless, be the right of the plaintiff, if he chose to exercise it, to pay off the amount of the lien and retain the property, and the defendant would have no alternative but to accept the money if seasonably tendered. But, as Judge Napton observes in *Dilworth v. McKelvy*, the "plaintiff might not see proper to tender the money; in which event a judgment in the alternative, to be determined at the defendant's option, will give the defendant the advantage of selecting between an execution to enforce a moneyed judgment and the possession of the property."

For the reason stated, the judgment will be reversed; and this court, proceeding to enter such judgment as the Circuit Court should have rendered, directs a judgment in favor of the defendant, against the plaintiff and his securities; that he return the property taken, or pay the assessed value thereof (one cent), at the election of the defendant, together with nominal damages (one cent) for the taking and detention of the property, and cost of suit, including the costs of this appeal. The other judges concur.

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THE STATE OF MISSOURI, Respondent, v. SAMUEL C. LAWRENCE,  
Appellant.

1. *Practice, civil—Trials—Jurisdiction, question of, always open for examination.*—Questions going to the jurisdiction of the court over the cause of action, or subject-matter of the complaint, are in order at any stage of the proceedings in a case.
2. *Practice, civil—Jurisdiction—Executions issued by Court of Criminal Correction for purpose of extortion.*—Forfeiture of office, and a disqualification

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to hold office and vote, were designed by the Legislature as part of the "punishment" to be visited on one convicted of illegally issuing an execution for purposes of extortion, under color of office as justice of the peace. (Gen. Stat. 1865, ch. 204, §§ 16, 19.) But the St. Louis Court of Criminal Correction, prior to the amendment of 1869 (Sess. Acts 1869, p. 196, § 13), had no jurisdiction over misdemeanors where the punishment following conviction went beyond a fine and imprisonment, and therefore had no jurisdiction of such a complaint.

*Appeal from St. Louis Court of Criminal Correction.*

*Higdon*, and *Brown & Huffman*, and *C. G. Mauro*, for appellant.

The record on its face shows that the St. Louis Court of Criminal Correction had no jurisdiction over the subject-matter charged in the complaint. (Gen. Stat. 1865, p. 897, § 10, p. 808, §§ 18, 23, p. 696, § 30.) Courts of limited or inferior jurisdiction have such jurisdiction only as is expressly conferred by statute, and their powers can not be enlarged by implication. That the court had no jurisdiction is manifest from the amendment of the act creating it. (Sess. Acts 1869, p. 196, § 13.)

*H. B. Johnson*, Attorney-General, and *Colcord* and *Sterling*, for respondent.

The disqualifications prescribed by section 18 (Gen. Stat. 1865, ch. 204) constituted part of the punishment in the case at bar. They are not pronounced by the court, but follow by operation of law.

CURRIER, Judge, delivered the opinion of the court.

This proceeding was commenced in the St. Louis Court of Criminal Correction, upon an information against the defendant, charging him with the commission of a misdemeanor in office. It is objected that it appears upon the face of the information that its subject-matter is not within the jurisdiction of that court. The question thus raised is open for examination here, although the point was not taken in the court below, since questions going to the jurisdiction of the court over the cause of action, or subject-matter of the complaint, are in order at any stage of the

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proceedings. (Wagn. Stat. 1015, § 10; Lindell v. Hann. & St. Jo. R.R., 36 Mo. 545; Valarino v. Thompson, 7 N. Y. 576.)

The complaint charges, among other things, that the defendant, under color of his office of justice of the peace, and for the purpose of oppression and extortion, illegally issued an execution against certain named parties. The statute under which the information is framed (Gen. Stat. 1865, ch. 204, p. 808, §§ 16, 17) prescribes, as a punishment for the alleged offense, imprisonment in the county jail for a term not exceeding one year, and by a fine not exceeding \$1,000; and the eighteenth section of the same chapter provides that any person who shall be convicted of the offense alleged against the defendant, shall be forever disqualified from holding any office of honor, trust, or profit, under the constitution and laws of this State, and from voting at elections. Section 23 of the same chapter further provides that a party convicted of an offense, "punishable by disqualification to hold office, shall, in addition to the other punishments prescribed for such offense, forfeit his office."

It is evident, from a collation of these several provisions, that the Legislature treated a forfeiture of office, and a disqualification to hold office and vote, as elements and portions of the "punishment" to be visited upon the convicted offender. He is deprived of office and disqualified, as in punishment for his official misconduct. Punishment, in the legal sense, is some pain or penalty warranted by law, inflicted on a person for the commission of a crime or misdemeanor, whether declared by the court or superinduced as a legal result of conviction. An offender may be punished as well by forfeiture and disqualification as by fine and imprisonment.

But the act establishing the St. Louis Court of Criminal Correction (Gen. Stat. 1865, p. 897, § 10) gives that court jurisdiction of misdemeanors, "the punishment whereof is by fine or imprisonment, or both," without expressly including misdemeanors punishable by forfeiture of office and the specified disqualifications, in addition to the fine and imprisonment. If the Legislature had intended to confer an unrestricted jurisdiction over all misdemeanors, different or additional language

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would have been employed. At all events, there is no express grant of jurisdiction over cases involving these specified disqualifications and forfeitures; and courts of inferior and limited jurisdiction can take nothing by construction or implication, but must show the power expressly given them, in every instance. It has been held to be a sound rule of construction to hold such courts to the exact limits of the jurisdiction conferred upon them by the statute, while a liberal construction is given to their proceedings as regards form and regularity. (*Jones v. Reed*, 1 Johns. 20.)

The view that the Legislature did not confer, or intend to confer, upon the Court of Criminal Correction jurisdiction over misdemeanors where the punishment following conviction went beyond a fine and imprisonment, finds support in the fact that the Legislature, at a subsequent session, amended the original act so as to bring misdemeanors involving forfeitures, etc., within the jurisdiction of the court in express terms. (*Acts 1869*, p. 196, § 13.) There was no occasion for this amendment unless it enlarged the scope of the original act.

Our conclusion is that prior to the amendment the St. Louis Court of Criminal Correction had no jurisdiction of the offense charged in the pending complaint. The judgment must therefore be reversed and the cause remanded. The other judges concur.

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THE STATE OF MISSOURI, Respondent, v. WILLIAM H. MILLER,  
Appellant.

1. *Constitution, section 32, article 4, mandatory.*—Section 32, article 4, of the constitution, which declares that "no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title," is equally obligatory and mandatory with any other provision thereof; and where a law is clearly and palpably in opposition to it, there is no other alternative but to pronounce it invalid.
2. *Act to prevent issue of false receipts, etc., constitutionality of.*—Section 32, article 4, of constitution.—The act entitled "An act to prevent the issue of false receipts or bills of lading, and to punish fraudulent transfers of property by warehousemen, wharfingers, and others," is sufficiently in conformity with

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section 32, article 4, of the State constitution. The act shows clearly that its object was to strike at a whole class of cases, and remedy an existing evil; and while warehousemen and wharfingers are enumerated in the title, "others" are spoken of, and the provisions of the act treat of subjects which have a natural connection.

*Appeal from St. Louis Court of Criminal Correction.*

*Hart & Peacock*, for appellant.

The indictment is framed under a section of a law which is unconstitutional and void, because, 1st, it treats of two subject-matters; 2d, the particular subject-matter treated in it is not mentioned in its title; 3d, nor is such subject-matter germane to that mentioned in the title of the act, which treats of transfers to bailees, and not sales to vendees. (Const. Mo., art. 4, § 32; State *ex rel.* Hixon v. Schofield *et al.*, 41 Mo. 39.) The act relates to a class of offenses of a kindred character, all relating to trusts in matters of trade and commerce. These trusts may differ in species, but in their general nature they harmonize and agree.

WAGNER, Judge, delivered the opinion of the court.

At the November term, 1868, of the St. Louis Criminal Court, the appellant was indicted upon the charge of violating the provisions of the thirteenth section of "an act to prevent the issue of false receipts or bills of lading, and to punish fraudulent transfers of property by warehousemen, wharfingers, and others." The section alluded to is as follows: "Whosoever shall purchase any goods, wares, and merchandise, or other commodity, for cash, and shall sell, hypothecate, or pledge the same to another, and use the proceeds thereof for any purpose other than the payment of the seller or vendor, with intent to cheat or defraud such seller or vendor, or who shall conceal, ship, or otherwise make way with, or deliver to another, any goods, wares, merchandise, or other commodities so purchased, without paying for the same, with the intent to cheat or defraud the seller or vendor thereof, shall be deemed guilty of a felony, and, upon conviction thereof, shall be punished by a fine not exceeding five



thousand dollars, or by imprisonment in the penitentiary for a term not exceeding five years, or by both such fine and imprisonment." (Acts 1868, p. 13, § 13; 1 Wagn. Stat. 221, § 12.)

There were four counts in the indictment. The first count charged that on the 8th day of August, 1868, the appellant purchased one thousand sacks of corn, of the value of \$2,500, of John M. Gilkeson and James L. Sloss, for cash, and, with intent to cheat and defraud said Gilkeson and Sloss, unlawfully and feloniously sold the same and used the proceeds thereof for a purpose other than the payment of the sellers and vendors. The second count charged that he hypothecated the corn so purchased, and used the proceeds thereof for a purpose other than the payment of the sellers and vendors. The third count charged that he delivered said corn to another without paying for the same, and the fourth count charged that he shipped the same without paying therefor. There being no evidence to support the fourth count, it was withdrawn; and after hearing the evidence the jury returned a verdict against the defendant of guilty of felony, as charged in the first, second, and third counts of the indictment, and assessed his punishment at a fine of two thousand dollars.

The verdict was amply sustained by the evidence, and there is no reason for reviewing or commenting on the instructions of the court, as in my judgment they are unexceptionable. But there is one question on which I have had serious doubts, and that is the constitutionality of the law as applied to this case. This is really the only point in the case requiring serious consideration. It involves a construction of section 32, article 4, of the constitution of this State, which declares that "no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title." This provision has of late been several times before this court. The courts in all the States where a like or similar provision exists have given it a very liberal interpretation, and have endeavored to construe it so as not to limit or cripple legislative enactments any further than what was necessary by the absolute requirements of the law. An exact and strict compliance with the letter would render legislation



almost impracticable, and would lead to a multiplicity of bills which would make our statutes ridiculous. The principle is a correct one, and the intention was good; it was designed to strike down a most vicious and corrupt system which prevailed in our legislative bodies, and which operated as a surprise, and was productive of fraud and plunder. It was intended to kill "log-rolling" and prevent unscrupulous, designing men and interested parties from dexterously inserting matters in the body of a bill, of which the title gave no intimation of the true character, or of comprising subjects diverse and antagonistic in their nature, in order to combine in its support members who were in favor of a particular measure, but who could not carry their object without an agreement to go for some other measure, when neither, on its own merits, could command the requisite majority.

In California and Ohio it has been held that the constitutional provision was merely directory, and that, if it was disregarded by the Legislature, its violation would not render the law void. But we take a different view of the subject, and consider it equally obligatory and mandatory with any other provision in the constitution; and where a law is clearly and palpably in opposition to it, there is no other alternative but to pronounce it invalid.

The ruling of this court has heretofore been that if the matters embraced in the bill were congruous and had a legitimate connection or relation to each other, the generality of the title would not make it objectionable. (*City of St. Louis v. Tiefel*, 45 Mo. 578; *State v. Mathews*, 44 Mo. 523; *State v. The Bank, etc.*, *post*, p. 528.) Where the constitution declared that "no private or local bill which may be passed by the Legislature shall embrace more than one subject, and that shall be expressed in the title," it was held that the character of the act was to be determined by its provisions, and not by its title; and general provisions were not rendered void by reason of their being contained in the same act with other provisions of merely local application, though the title of the act referred to the latter provisions only. (*The People v. McCann*, 16 N. Y. 58.) So, in another case, the court said: "There must be but one subject; but the mode in which the subject is treated, and the reasons

which influenced the Legislature, can not and need not be stated in the title, according to the letter and spirit of the constitution." (Sun Mutual Ins. Co. v. The Mayor, 4 Seld. 241.) In the case of O'Leary v. County of Cook, 28 Ill. 534, it was decided that a provision in an act incorporating a college, prohibiting the sale of ardent spirits within a distance of four miles, although no such object or subject was named in the title of the bill, was not unconstitutional; that such a provision in a law incorporating a college was so germane to the primary object of the charter as not to conflict with the constitution, which declared that no law should embrace more than one subject, which should be expressed in the title. The same position was assumed by this court in *St. Louis v. Tiefel*, and *State v. Matthews*, as above cited.

The Supreme Court of Louisiana says it is improper to give this provision "too vigorous and technical a construction." If in applying it we should follow the rules of a nice and fastidious verbal criticism, we should often frustrate the action of the Legislature, without fulfilling the intention of the framers of the constitution; and so it has been said that an act entitled an act to "provide a homestead for widows and children," was good, though in fact the statute only provided the pecuniary means sufficient to purchase a homestead. (*Succession of Lanzetti*, 9 La. Ann. 329.)

Now, the nature and object of the act is clearly defined in the title. It is to prevent the issue of false receipts or bills of lading, and to punish fraudulent transfers of property by warehousemen, wharfingers, and others. The act, though penal, is highly meritorious. It was intended to subserve a good purpose—to promote honesty and prevent fraud. By a fair construction, it relates to a class of offenses of a kindred character, all connected, blended, and germane. It was designed to prohibit all persons who obtained the possession of goods, and had the *indicia* of ownership, from transferring, hypothecating, or pledging them, in fraud of the rights of the seller or vendor.

The act shows clearly that its object and aim was to strike at a whole class of cases, and remedy an existing evil; and whilst warehousemen and wharfingers are specifically enumerated in the

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title, others are spoken of, and the provisions of the act treat of subjects which have a natural connection. A glance at the title would naturally show what was to be found in the law. A title more definite and comprehensive might easily have been framed; but, as it is, it is not so plainly defective as to authorize this court to declare the law unconstitutional.

Judgment affirmed. The other judges concur.

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JOHN F. FURY, Appellant, v. JAS. MERRIMAN, Respondent.

1. *Practice, civil—Verdict—Weight of evidence.*—The rule that an appellate court should not disturb a verdict when there is evidence to sustain it, will not prevent the reversal of a cause when the verdict of the jury must of necessity have been for a smaller sum than the one in the record.

*Appeal from St. Louis Circuit Court.*

*Green & Reese*, and *Allen & Reese*, for appellant.

*Jewett and Van Wagoner*, for respondent.

BLISS, Judge, delivered the opinion of the court.

The plaintiff brought his action for work, etc., in painting defendant's dwelling-house, out-houses, and fences, and for grain-ing a portion of the inside, and declared in the form of an *indebitatus assumpsit*, exhibiting with his petition a copy of his account, which covered all the work and materials, and which was all charged to the defendant. The answer denied everything, and upon the trial it was developed that the plaintiff had taken a contract from one Gerhart, the general contractor, to do the painting for \$1,350, according to written specifications, and that Gerhart had paid him this amount, which is the sum credited to defendant in his account. The trial progressed without any objection to the form of the petition, and the plaintiff obtained a verdict for \$985.50, upon which the court rendered judgment, which was reversed at general term.

Notwithstanding the form of the petition, the case was sub-

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mitted to the jury as though the charges had been for extra work; and they were told by the court that the plaintiff was entitled to nothing for what was embraced in the specifications of the work to be performed under his contract with Gerhart, but could recover of the defendant the value of the extra work and materials which were ordered by him, provided they were embraced in the copy of his account. The whole matter was placed fairly before the jury, so far as instructions could do it, and they might have rendered an intelligent and unimpeachable verdict had the petition set out the true cause of action; but it was framed to cover all the work and materials done and furnished, mixing up and combining in the same items, so that they could not be severed, what was within the contract with Gerhart with what was claimed to have been ordered by the defendant outside of the contract. The jury were instructed to charge nothing to the defendant for the work and materials so covered by the contract; also, to charge nothing unless it was embraced in the account exhibited in the petition, so it became necessary for them to separate the two classes of items; but it is very clear, from comparing the verdict with the account and with the testimony, that the jury did not attempt any such thing, but rendered it upon the same view that dictated the petition, throwing aside the contract altogether. All the items in the account taken together, not embraced in the contract, or not so combined with those that were embraced as not to be severed, would not amount to the verdict, nor could a new account of separate items of that amount be made out of the plaintiff's evidence. He may be honestly entitled to the sum given him, but the jury could not know it. For the few items in the account not covered by the contract, a verdict could have been given that would warrant a judgment, but it must of necessity have been for a smaller sum than the one in the record. The court, then, that tried the case, should have given a new trial, and the appellate court committed no error in reversing its judgment.

This does not conflict with the rule that an appellate court should not disturb a verdict when there is evidence to sustain it, because it may differ with the jury as to the weight of that evi-

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dence. In this case there was none; for evidence that could warrant a verdict for \$500 only would not sustain one for \$1,000, and it is error of law to render a judgment upon such a verdict. Had the plaintiff declared alone for the work done for defendant, and not combined his charges with that performed for Gerhart, and under a special contract, he, perhaps, might have made a bill of items and furnished evidence that would sustain a verdict as large as the one obtained. His petition should be amended so as to charge the defendant specifically with the extra work claimed to have been done for him, and the evidence be brought to bear specifically upon these charges. The jury will then have something to guide them.

The judgment of the court at general term is affirmed and the cause remanded, with leave to amend the petition. The other judges concur.

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JOHN SCHMIDT, Respondent, v. CASPAR SCHMAELTER and JOHN KELLNER, Appellants.

1. *Notes and bills—Probata and allegata—Verdict, amendments after.*—A., B., and C. were sued as the makers of a promissory note. The proof showed that a firm, of which A. and B. were two of the members, by its copartnership name, together with C., actually made the note. *Held*, that the defect in the description did not amount to a misdescription. The case was not one where the allegations were unproved in their entire scope and meaning, in the sense of the statute (Gen. Stat. 1865, p. 688; Wagn. Stat. 1058, § 1); and an amendment of the defect after judgment, in accordance with the statute Wagn. Stat. 1034, §§ 5, 6), furnished a perfect protection against a second suit on the same note.
2. *Bills and notes—Signature of maker on back of note—Co-surety, etc.*—It is of no consequence that the signature of the maker is placed on the back of the note, so that he signs it as a maker; nor does it make any difference that, as between himself and his co-makers, he is a surety.

*Appeal from St. Louis Circuit Court.*

*F. & L. Gottschalk*, for appellants.

I. There was a fatal variance between the pleading and proof. (2 Greenl. on Ev. 142, § 160; Edw. on Bills, 574; Cotes v. Campbell, 3 Cal. 191; Spangler v. Pugh, 21 Ill. 85.)



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II. Plaintiff sues on one contract and proves another. He describes defendant Kellner as maker, and proves him as security. This is fatal. (Perry v. Barrett, 18 Mo. 140; Edw. on Bills and Prom. Notes, 204, § 217.)

III. A judgment erroneous as to one, is so to all. (Covenant Mutual Life Ins. Co. v. Clover, 36 Mo. 392; Cates v. Nickell, 42 Mo. 168.)

*Stewart & Wieting*, for respondent, cited *Powell et al. v. Thomas*, 7 Mo. 440; *Lewis et al. v. Harvey et al.*, 18 Mo. 74; *Perry v. Barrett*, *id.* 140; *Schneider v. Schiffman*, 20 Mo. 571; *Baker v. Block*, 30 Mo. 225; *Buchner v. Liebig*, 38 Mo. 188; *Wagn. Stat.* 1036, § 19, ¶ 9; *Jones v. Louderman*, 39 Mo. 207; *Washb. Pl.* 120-182; *Carter v. Hope*, 10 Barb., S. C., 180; *Fay v. Grimstead*, *id.* 321; 1 Chit. Pl. 49; *id.* 336-7; *Rice v. Shute*, 5 Burr. 261; *Caldwell v. Caldwell*, 7 Mass. 68; *Every v. Merwin*, 6 Cow. 360; *Fay v. Golding*, 10 Pick. 122; *The Boston Timb. Co. v. Persons*, 2 Hill, 126; *Morris v. Wadsworth*, 17 Wend. 103.

CURRIER, Judge, delivered the opinion of the court.

The plaintiff sued Caspar Schmaelter, Adam Diefenbach, and John Kellner as the makers of a negotiable promissory note, which was alleged to be lost. The proof was that the firm of Michael Diefenbach & Co. and John Kellner made the note, and that Caspar Schmaelter and Adam Diefenbach were members of the firm. The defendants insist that the proof was totally variant from the allegations, amounting to a total failure of proof. Granting that the note was defectively described, the defect did not amount to a misdescription. The description was good as far as it went. The proof shows that the parties who were alleged to be the makers of the note were so in fact. In this respect there was a literal correspondence between the allegation and proofs. It is far from being a case where the allegations are unproved in their "entire scope and meaning," in the sense of the statute. (Gen. Stat. 1865, p. 683, § 1.) Nor is it a case where one contract is alleged and another is proved; nor



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does the fact that the note was lost make any difference. That has nothing to do with the identity of the contract. The amendments made after judgment, in accordance with the statute (2 Wagn. Stat. 1034, §§ 5, 6), furnish a perfect protection to the defendants against a second suit upon the same note, and remove all ground of cavil on that point.

There is no force in the objection founded upon the fact that Kellner signed the note by writing his name upon the back instead of upon the face of it. It is of no consequence on what part of the note his signature was placed, so that he signed it as an original maker. Nor does it make any difference that, as between himself and Diefenbach & Co., he was a surety. He was not the payee of the note; nor was he, in any legal sense, an indorser. (Perry v. Barrett, 18 Mo. 140; Buchner v. Liebig, 38 Mo. 188.) The law on this subject has been long and well settled.

Let the judgment be affirmed. The other judges concur.

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JOSEPH P. VASTINE, Appellant, v. SEYMOUR VOULLAIRE,  
Respondent.

1. *Circuit attorneys—Fees.*—In cases where indictments were found and drawn up during the term of one incumbent of the office of circuit attorney, and he performed all the actual services which were rendered, and the cases were continued and not brought to trial, and no services rendered in them by the next incumbent of that office during his term, the fees accrued belonged to the former.

*Appeal from St. Louis Court of Criminal Correction.*

*Lackland, Martin & Lackland*, for appellant.

*Seymour Voullaire*, for respondent.

WAGNER, Judge, delivered the opinion of the court.

The contest in this case springs out of each party claiming certain fees as circuit attorney of the Eighth Judicial Circuit. It was tried in the court below on an agreed statement of facts. The judgment was for the respondent.

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Voullaire was the immediate predecessor of Vastine in the office, and the statement shows that the cases in which he received fees were where the indictments were found and drawn up during his term of office, and where he performed all the actual services which were rendered. Some of the cases were on the docket when Vastine came into office, but they appear to have been continued, and were never brought to trial, and he performed no services in them. The fees were regularly taxed up and paid to Voullaire, and, we think, rightly. The counter-claim presented by Voullaire stands upon the same ground. He was entitled to the items included therein, upon the principles above indicated.

Judgment affirmed. The other judges concur.

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HENRY ECHELKAMP, Respondent, v. BEMAI SCHRADER,  
Appellant.

1. *Injunction, when will lie in case of trespass.*—An injunction will not be awarded to restrain the commission of an ordinary trespass when the injury flowing from it is not irreparable, and where an adequate remedy may be had in the recovery of damages against a solvent party; but it will lie where the acts done or threatened are ruinous to the property trespassed upon, or are of a character to permanently impair its just enjoyment in the future.
2. *Injunction—When title to locus in quo is uncertain, temporary injunction will be granted.*—When the right or title to the place in controversy, or to do the act complained of, is doubtful and explicitly denied in the answer, no permanent or perpetual injunction will usually be granted till such trial at law is had settling the contested rights and interests of the parties. In such case, where plaintiff is in possession of the title to the *locus in quo*, defendant is the proper party to bring the action to test the rights of the respective parties; and in the event of his failure to do so, the injunction should be made perpetual.

*Appeal from St. Louis Circuit Court.*

*Krum, Decker & Krum*, for appellant.

I. The court below should have dissolved the injunction and dismissed the bill. The answer disputes the respondent's title. (Eden on Injunctions; *Field v. Jackson*, 2 Dick. 599; *Pillsworth v. Hopton*, 6 Ves. 51; *Smith v. Collier*, 8 Ves. 89;

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Hannon v. Gardiner, 7 Ves. 305; Norway v. Rowe, 19 Ves. 144-7; Irvin v. Dixon, 9 How. 10, 28.)

II. Even if respondent had title, the injunction should have been dissolved. The facts do not make a case of irremediable mischief. If appellant was a trespasser, respondent could have obtained adequate satisfaction in the ordinary course of law. (James, etc., v. Dixon, 20 Mo. 79; State, to use of Connolly, v. Parkville & G. R. R.R., 32 Mo. 496; Hayden v. Tucker, 37 Mo. 214; Burgess v. Kattleman, 41 Mo. 480; Jerome v. Ross, 7 Johns. Ch. 330, approved in Smith v. Pettingill, 15 Verm. 84; Arnold v. Klepper, 24 Mo. 277; Newitt v. Gillespie, 1 How., Miss., 108; Rankin v. Charless, 19 Mo. 491.)

III. Unless this court should decide that a mere naked possession of tenants of plaintiff is sufficient title to obtain a perpetual injunction against the owner, who has also the right of possession, the decree below can not be sustained. The facts show conclusively that plaintiff could not maintain any action at law against defendant; in other words, he has no legal right. He could not maintain ejectment, because defendant has the better title; nor trespass, *quare clausum fregit*, because defendant, by plea of *liberum tenementum*, would defeat the action (2 Greenl. Ev., §§ 625-6, and cases cited; 1 Chit. Pl. 502-3; Argent v. Durand, 7 D. & E. 403; Emerson v. Sturgeon, 18 Mo. 172; Hill. Rem. for Torts, 207; Reed v. Price, 30 Mo. 446; Steph. on Pl. 319; 34 Mo. 419; Walker v. Swasey, 2 Allen, Mass., 313); nor forcible entry, because the plaintiff has not even actual possession. The principle of injunctive relief against a tort is that damage is caused or threatened to property admitted or legally adjudged to be the plaintiff's. (Adams' Eq. 207.) Irreparable injury to the freehold is the source of injunctive relief in such cases. (9 Wend. 577; Adams' Eq. 35; 1 Sto. Eq. Juris., § 24.) A party complainant must have established his right to a redress by an action at law, before he is entitled to an injunction. (Arnold v. Klepper, 24 Mo. 277; Jeremy's Ch. Juris. 310.)

Colvin, for respondent.

CURRIER, Judge, delivered the opinion of the court.

These parties, as the case finds, were adjoining land-owners, and derived title from a common grantor. The line dividing their respective lots, as they supposed, passed through the center of a double house, one half of which was believed by them to be on the plaintiff's lot, and the other half on the defendant's, thus furnishing to each party a connected, but independent, tenement. At the time the suit was brought, the plaintiff had been in peaceable possession of his lot and tenement some seventeen years. The house was a frame building, and was standing on the premises at the time of the plaintiff's purchase. It appeared, however, from a late and careful survey, that the plaintiff's tenement, or half of the double house, was in fact three feet on the defendant's ground, or on ground embraced within the limits of his original lot.

In the month of January, 1869, the defendant, wishing to remove his share of the house for the purpose of rebuilding, notified the plaintiff thereof, and of his intention to sever the house on the line dividing their respective lots. In pursuance of this plan, the defendant employed careful and competent parties to saw through the house on the true line of division between the lots, cutting three feet from the tenement occupied by the plaintiff. The work was commenced, whereupon the plaintiff instituted these proceedings for injunction. A temporary injunction was granted, which was subsequently made permanent. The defendant appeals from the judgment of the court granting the perpetual injunction. The question is thus raised whether the facts stated warranted the action of the court.

1. The jurisdiction of courts of chancery in cases of trespass is of modern origin, and it is uniformly held that an injunction will not be awarded to restrain the commission of an ordinary trespass where the injury flowing from it is not irreparable, and where an adequate remedy may be had in the recovery of damages against a solvent party. Chancellor Kent reviews the subject elaborately in *Jerome v. Ross*, 7 Johns. Ch. 315, and reaches the result above stated. He says: "I do not know a

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case in which an injunction has been granted to restrain a trespasser merely because he is a trespasser." (See also *James v. Dixon*, 20 Mo. 79; *Smith v. Pettingill*, 15 Verm. 82; 2 Sto. Eq. Jur., § 928; *Hill. on Injunc.* 279, ch. 10.)

2. While chancery will not use its extraordinary powers to restrain by injunction a "trespasser merely because he is a trespasser," it will, nevertheless, interfere by injunction where the acts done or threatened are ruinous to the property trespassed upon, or are of a character to permanently impair its just enjoyment in the future, as when a trespasser digs into and works a mine to the injury of the proprietor, or where timber is attempted to be cut down by a trespasser in collusion with the tenant of the land; or where there is a dispute respecting the boundaries of estates, and one of the claimants is about to cut down ornamental trees in the disputed territory.] "In short," says Judge Story, "an injunction is now allowable in all cases of timber, coals, ores, or quarries, when the party is a mere trespasser, or where he exceeds the limited rights with which he is clothed, upon the ground that the acts are or may be an irreparable damage to the particular species of property." (See 2 Sto. Eq. Jur., §§ 860, 928, 929, and the numerous cases cited.)

This doctrine is abundantly sustained by the authorities, and has become incorporated into the general system of equity jurisprudence. The case at bar clearly falls within the principle enunciated. The acts of the defendant done or threatened, and which he admits, are of a character to destroy the plaintiff's dwelling-house as a place fit for human habitation. He proposed to remove one entire end of the building, leaving the interior of the plaintiff's house exposed and wholly unprotected. If an injunction will issue to restrain a trespasser from interfering with a party's timber, coals, ores, or ornamental trees, it will not be denied, other things being equal, when it is invoked to save a party's domicile from disturbance and substantial destruction, so far as its usefulness as a place of residence is concerned.

3. But the defendant, by his answer, contests the plaintiff's title, and the case fails to find who held the title to the *locus in quo* at the time the suit was commenced. It is found that the



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plaintiff had been in peaceable possession for about seventeen years; but whether this possession was adverse, under claim of title, does not appear. For aught that is shown to the contrary, it is possible that the title may be in the defendant, as it apparently is, unless the plaintiff's possession was hostile and adverse. If he has the title, then he has a right of possession, and ought not to be precluded from acquiring it. But if the injunction stands, he is under a permanent judicial inhibition against in "any wise" meddling with the property. His right to litigate the title in an action at law should be preserved to him. In *Irwin v. Dixon*, 9 How. 28, § 10, the court says: "When the right or title to the place in controversy, or to do the act complained of, is, as here, doubtful, and explicitly denied in the answer, no permanent or perpetual injunction will usually be granted till such trial at law is had settling the contested rights and interests of the parties." (See *Stewart v. Chew*, 3 Bland's Ch. 440; *Falls Village Water Power Co. v. Tibbetts*, 31 Conn. 165.) In order, therefore, to preserve to the defendant such legal rights in the premises as he may have, if any, and to give him an opportunity to establish them in an action at law, the judgment of the court below, making the injunction perpetual, will be reversed; the temporary injunction, in the meanwhile, being continued, and to be made permanent unless the defendant shall immediately institute his suit at law to establish his title to the disputed premises, and prosecute the same with effect.

It is usual in cases like this, where the title itself comes in controversy, to grant a temporary injunction to await the event of an action at law to be prosecuted by the plaintiff. But here the plaintiff is in actual possession, and has been for many years, and is therefore not in a position, nor has he any occasion, to sue. The defendant is the proper party to bring an action and test the rights of the respective parties at law. If he neglects to do this in a reasonable time, he will have no just grounds of complaint if the injunction is made perpetual against him in consequence of his own negligence.



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For the reason stated, the judgment will be reversed and the cause remanded, to be proceeded with by the Circuit Court in accordance with the views herein expressed. (State v. Mobile, 5 Porter, Ala., 317.) The other judges concur.

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STATE OF MISSOURI, Respondent, v. GARRETT LARGER, Appellant.

1. *Husband and wife—Neglect to "maintain or provide"—Words sufficient under statute.*—Under the act of 1867, p. 112, section 1, a complaint which charged that the defendant abandoned his wife, and failed to maintain or provide for her, is sufficient. The words "maintain and provide," as used in the statute, mean simply a provision of maintenance, the neglect of which, after abandonment, completes the offense defined.
2. *Misdemeanors, trial of—Jury—Waiver.*—In misdemeanor cases, the statute does not require any express waiver of a jury in order to authorize a trial by the court. If defendant was not willing to be tried by the court, he should have objected at the time; and in such cases, as it is not required that the submission shall be entered on the minutes, or in any manner become a matter of record, it is not to be presumed from the silence of the record that the court proceeded irregularly and without authority.

*Appeal from St. Louis Court of Criminal Correction.*

*S. N. Taylor*, for appellant, cited 1 Chit. Crim. L. 174, 231; Barb. Crim. L. 319; 2 Strange, 900; State v. Fitzsimmons, 30 Mo. 236; Neagles v. State, 10 Mo. 498; State v. Mansfield, 41 Mo. 475.

*H. B. Johnson*, Attorney-General, and *J. P. Colcord*, for respondent, cited State v. Newberry, 43 Mo. 429.

CURRIER, Judge, delivered the opinion of the court.

The defendant seeks to arrest the judgment herein because of the supposed insufficiency of the complaint, which undertakes to set out the facts constituting a misdemeanor. The statute under which it is framed (Acts 1867, p. 112, § 1) enacts that a husband who shall, without good cause, abandon his wife, and who shall also fail to maintain and provide for her, shall be deemed guilty of a misdemeanor. The complaint charges that the

defendant abandoned his wife and failed to maintain or provide for her, using "or" instead of "and" as a connection between the words "maintain" and "provide." This variation from the statute is thought to be fatal to the complaint. I am of a different opinion. The complaint charges the abandonment, and that the defendant neglected and refused either to maintain or provide for his deserted wife. If he did neither, he neglected both. Besides, the words "maintain and provide," as used in the statute, mean simply a provision of a maintenance, the neglect of which, after abandonment, completes the offense defined by the statute. We think this neglect is sufficiently charged in the complaint.

But it is further objected that the judgment was erroneous because the trial was by the court, the record failing to show that a jury was waived. In misdemeanor cases, the statute does not require any express waiver of a jury in order to authorize a trial by the court. The provision is (Gen. Stat. 1865, p. 848, § 2) that the "defendant and prosecuting attorney, with the consent of the court, may submit the trial of misdemeanors to the court." It is not required that such submission shall be entered on the minutes, or that it shall in any manner become a matter of record. It is not to be presumed, therefore, from the silence of the record, that the court proceeded irregularly and without authority. If the defendant was not willing to be tried by the court, he should have objected at the time. Having taken his chances with the court, it is too late now to object that he was not tried by a jury.

The statute (Gen. Stat. 1865, pp. 673-4, §§ 12, 14) in relation to the waiver of a jury in civil causes is quite different from the statute in relation to the submission of misdemeanor cases to the court for trial. The former statute provides not simply for a submission to the court, but that, as an indispensable preliminary condition to such submission, the parties shall expressly waive the intervention of a jury, and that such waiver shall be "entered on the minutes," and thus become a matter of record. In this class of cases it is necessary that the records or minutes should show affirmatively upon their face the fact of the

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waiver, because the statute requires it. In misdemeanor cases the statute makes no such requisition.

The judgment will be affirmed; the other judges concurring.

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STATE OF MISSOURI, Respondent, v. DAVID C. WHITE, Appellant.

1. *Husband and wife*—Action charging husband with refusal to maintain wife, etc.—In an information by the wife charging her husband with abandoning her without good cause, and refusing to maintain and provide for her, the question put to a witness, whether defendant had not rented of him a house which plaintiff refused to occupy, was proper, and should have been allowed.

*H. B. Johnson*, Attorney-General, and *J. P. Colcord*, for respondent.

*Patrick & Drummond*, for appellant.

BLISS, Judge, delivered the opinion of the court.

Defendant's wife, by information in said court, charged him with abandoning her without good cause, and refusing to maintain and provide for her. The case was tried by the court, and in the progress of the trial the prosecutrix testified that defendant had left her for about five weeks, and during that time she had received nothing from him for her support. Upon cross-examination, she testified that he had not rented a house for her of Mr. Ferrington, which she refused to occupy. After the State had closed, the defendant, among other evidence, offered Mr. Ferrington as a witness, and asked him if he (defendant), during the last five weeks, had not rented of him a house which his wife refused to occupy. The attorney for the State objected to the question, and the objection was sustained. The record fails to show any reason for the objection or for the action of the court. The question clearly went to the merits of the issue. If defendant furnished his wife with a suitable residence, he had so far contributed to her support; and if she refused to occupy it, it certainly was not his fault. He had a right to contradict her testimony, as well as to prove affirmatively all his acts in the

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direction of his duty in the premises, and the court erred in not permitting him to do so. Certain other questions were raised which have been decided in *The State v. Larger*, *ante*, p. 510.

Judgment reversed and cause remanded. The other judges concur.

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THE MECHANICS' BANK, Appellant, v. THE MERCHANTS' BANK,  
Respondent.

1. *Corporation—Sale of stock in, under execution, gives purchaser what title.*  
—A sale of shares of stock of an incorporated company, under execution, will not vest the title thereto in the purchaser if the defendant in the execution had none; nor will he acquire any greater or other rights than the seller had.
2. *Corporation—Shares of stock—Transfer of indebtedness to bank.*—The by-law of a bank forbidding the transfer of stock where the owner was indebted to the bank, is valid, although inconsistent with the general law of the State governing the transfer of property; and in case of the sale under execution of shares of stock, the purchaser can not recover the shares, in an action of trover against the bank, till such indebtedness be satisfied.

*Appeal from St. Louis Circuit Court.*

*Cline, Jamison & Day*, for appellant.

I. The by-law set out in the agreed case is to be most strictly construed against the bank. It only purports to prevent the stock-owner from transferring his stock while he remains indebted to the corporation. It does not pretend to interfere with the rights of the general creditor to levy and sell the stock in the manner prescribed by law. (See tit. Executions, 1 Wagn. Stat. 607, §§ 25 26, 28.)

II. If the Merchants' Bank were permitted to set up a lien on this stock, it would be a fraud upon the purchaser at sheriff's sale. (*Chouteau et al. v. Seddin et al.*, 39 Mo. 248; *Newman v. Hook*, 37 Mo. 207; 1 Greenl. Ev. 207; 26 Verm. 373; 7 Cow. 762; 7 Johns. 338; 12 Wend. 423; 9 Barb. 618.)

III. The Merchants' Bank was prohibited by the forty-third section of its charter from taking stock or any other personal

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chattels, except money, in payment of debts. And the stock-owner was duly prevented from transferring his stock when in arrears on installments due for the stock. By clear implication, no bank was authorized to issue its stock until it was fully paid up. (Sess. Acts 1857, pp. 21, 25, 43, 45.)

IV. The court erred in applying the authority of *The Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149, to this case.

V. If the Merchants' Bank, by its charter, had been placed upon the same footing with the Perpetual Insurance Company, then the doctrine of that case could not apply to this, as the rights of a general creditor who has taken a perfect legal title at sheriff's sale, without notice of any court equities in favor of the Merchants' Bank, can not be effected thereby, and its right to recover in this case is fully maintained in the following cases: *Chouteau Spring Co. v. Harris*, 20 Mo. 383; *Tuttle v. Walton*, 1 Ga. 43; *Bank of Utica v. Merch. & T. Bank*, 20 N. Y. 501; *Bates v. New York Ins. Co.*, 3 Johns. 238; *Sargeant et al. v. Franklin Ins. Co.*, 8 Pick. 90.

VI. No lien exists at common law in favor of an incorporated company on the stock of its debtor. (*Mass. Iron Co. v. Hooper*, 7 Cush. 183; *Heart v. State Bank*, 2 Dev. Eq. 111; *Frankfort & S. Turnpike Co. v. Churchill*, 7 B. Monr. 427.)

*T. T. Gantt*, for respondent.

The judgment of the Circuit Court is in conformity with the ruling of this court in the case of *The Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *vide* also *Union Bank of Georgetown v. Laird*, 2 Wheat. 390; *Brent v. Bank of Washington*, 10 Pet. 596.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff sued the defendant for the conversion of fifteen shares of stock. From the record it appears that the fifteen shares of the stock of the defendant were, on the first day of January, 1861, held by Alonson F. Doak, James D. Donnell, and John S. Williams, each holding five shares, the par value of which was \$100 per share; that in September, 1861, Doak and

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Williams, being then directors of the branch of the Merchants' Bank at Osceola, took from the vaults the sum of \$500 each, in gold; that Donnell was then indebted to the Merchants' Bank in the sum of \$2,500, no part of which has been paid.

The charter of the bank, passed in 1857, and the amendments thereto, passed in 1864, were made part of the case. The amendatory act of 1864 contains the following: "The directors of the parent bank of the Merchants' Bank of St. Louis shall have power to make all by-laws, not inconsistent with any existing law of the State, for the management of its property, the regulation of its affairs, and the transfer of its stock; and the directors of any branch of said bank shall have a similar power, subject to the approval of the parent bank."

On the 26th of February, 1864, the directors of the parent bank at St. Louis adopted the following by-law: "Owners of stock, upon the surrender of the certificates of stock which may have been issued to them, may receive certificates of same, signed by the president and cashier, in such portions and sums as they may choose, and transfer thereof shall only be made on the books of the bank at St. Louis. But no transfer of stock shall be made so as to change the legal ownership thereof, except upon the transfer book at the office where it shall be entered. \* \* \* Nor shall any such transfer be made so long as the stockholder desiring to make such transfer is indebted in any manner to the bank."

It further appears that Doak and Williams, at the time of the taking of the gold, as aforesaid, from the vaults of the bank, declared that they thereby intended to take out the amount of their stock in gold; that, under judgments rendered at the March term, 1864, of the Circuit Court of Hickory county, executions were issued on the 17th day of that month, in favor of the plaintiff, and against Doak, Donnell, and Williams, and under these executions the sheriff levied on, advertised, and sold to the plaintiff the fifteen shares of stock. Upon the foregoing facts the court below rendered judgment for the defendant. The question is whether by the judgment, levy, and execution sale, the plaintiff acquired any title to the stock as against the defendant.



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One of the main incidents of property is its transferability. The power of disposing of stock, like the power of disposing of any other property, is a common right, and necessarily attaches to ownership. But while the transfer may not be totally restrained, it may be the subject of fixed and determinate regulations. Under the statutes relating to executions, shares of stock in an incorporated company, belonging to the defendant, may be seized and sold by the sheriff in the manner provided in the act. (1 Wagn. Stat. 607, §§ 25, 26, 28.) The regulation and manner of proceeding are prescribed, but the sale will not vest a title in the purchaser if the defendant in the execution had none; nor will he acquire any greater or other rights than the seller had.

The rule announced in *The Perpetual Insurance Company v. Goodfellow*, 9 Mo. 149, is decisive of this case. It was there declared that the provision of a charter making the stock of a corporation personal property, and authorizing the board of directors to make rules and regulations concerning the transfer of the stock, subject to the general law of the State, authorized the board to adopt a rule prohibiting the transfer of stock until all debts due by the owner of the stock, to the corporation, should be paid, although such rule was inconsistent with the general law of the State governing the transfer of personal property.

In the present case, the amendment to the charter gave the board direct authority to adopt the by-law prohibiting the transfer of stock where the owner was in default. We see nothing inconsistent with justice and sound policy in such a proceeding. It is simply giving the corporation the right of set-off as against its defaulting stockholders. The equities of the plaintiff were certainly not superior to those of the defendant. Donnell was indebted to the defendant in the sum of \$2,500, which amount has never been paid. Doak and Williams took from the vaults of the bank \$500 in gold each. That amounted to more than the par value of the shares they respectively held. They were then all defaulters, and the defendant could not be coerced into the transfer of the stock till the arrearages were paid up. The

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principles governing this question were very fully discussed by this court in the case above alluded to, and it would be wholly supererogatory to re-state them.

Judgment affirmed. The other judges concur.

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**SOUTHWESTERN FREIGHT AND COTTON EXPRESS COMPANY, Appellant, v. GEORGE P. PLANT et al., Respondents.**

1. *Sales—Delivery, constructive and actual—Lien of vendor.*—Where nothing is said at the time of purchase of goods about payment, the law presumes that the sale is for cash; and in such case payment and delivery are immediate and concurrent acts, and the vendor has the indisputable right to refuse to deliver without payment; and although the counting out and separation would amount to a constructive delivery, so as to vest title in the vendee and make the property at his risk, still actual delivery and change of possession could not be coerced until payment is made. There may be a delivery which will pass title, but while possession is retained the lien will not be destroyed. (Southwestern F. & C. P. Co. v. Stanard, 44 Mo. 71, affirmed.)
2. *Sales—Sub-vendee has no greater right than the vendee.*—A sub-vendee, or a third party to whom an order is given for the delivery of goods, has no rights greater than, or superior to, the person from whom he derives title. If the vendor had the possession or the right of detention for the unpaid purchase money, he would still retain that right notwithstanding the assignment or transfer.

*Appeal from St. Louis Circuit Court.*

*Jones & Gardiner*, for appellant.

I. By their acceptance defendants ratified the verbal sale to Lamb & Quinlin, and the transfer by them to plaintiff, and they surrendered their possession to plaintiffs and made themselves their agents. There was, then, a delivery to plaintiff. (Whitehouse v. Frost, 12 East, 614; Stovell v. Hughes, 14 East, 308; Ellmore v. Stone, 1 Taunt. 458; Mervin v. Vallis, 6 Ellis & Block, 726; Gillet v. Hill, 4 Tyrw. 250; Sto. on Sales, 289; Hurry v. Mangles, 1 Campb. 452; Harman v. Anderson, 2 Campb. 243; Stonard v. Dunkin, *id.* 344; Hall v. Griffin, 3 M. & S. 732; Barrett v. Goddard, 3 Mason, 107; Chapman v. Searle, 3 Pick. 38; Scudder v. Worster, 11 Cush. 578; Frazier v. Hilliard, 2 Strob. 309; Kemberly v. Patchin, 19 N. Y. 330.)

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II. There was an actual delivery and taking possession. (Calkins v. Sargeant, 17 Conn. 154; Jewett v. Warren, 12 Mass. 300; Bates v. Conkling, 10 Wend. 389; Stovell v. Hughes, *supra*; Shindler v. Houston, 1 Denio, 51; Smythe v. Syms, 5 N. Y. 41; Carlton v. Sumner, 4 Pick. 516.) This is a case in which the doctrine of estoppel applies in all its force. (Gosling v. Binney, 5 Moore & Payne, 160; 7 Bingham, 339; Stonard v. Dunkin, *supra*; Hall v. Griffin, 3 M. & S. 732.)

*George P. Strong*, for respondents.

I. Plant & Co. having sold this flour to Lamb & Quinlin for cash, or without any agreement for credit, or any other mode of payment, could not be compelled to deliver it until they were paid for it.

II. Even if defendants had counted out the two hundred barrels of flour, and separated it from a larger number, it did not amount to a delivery, because there was no act by either party which was designed by vendor and accepted by vendee as a delivery of the flour. It was still in vendor's possession, subject to his control and at his risk. (Southwestern F. & C. P. Co. v. Stanard, 44 Mo. 71; 1 Chit. Pl. 147-8; Owenson v. Moore, 7 T. R. 64; Ballard v. Burgett, 47 Barb. 646, 650; Copland v. Bosquet, 4 Wash. C. Ct. 588; Fleeman v. McKean, 25 Barb. 474, 480; Palmer v. Hand, 13 Johns. 434; Bigelow v. Huntley, 8 Verm. 151.)

WAGNER, Judge, delivered the opinion of the court.

Action to recover damages charging the defendants with the unlawful conversion of two hundred barrels of flour, the property of the plaintiff. The record shows that in September, 1867, Lamb & Quinlin contracted with defendants for the purchase of two hundred barrels of flour, at the price of thirteen dollars and fifty cents per barrel; that on the 27th of September, 1867, they gave to Merritt, president of the plaintiff, an order on the defendants for one hundred barrels of the flour; and on the 30th of the same month they gave him an order for the remaining one hundred barrels. On the receipt of these orders, but before

their acceptance, the plaintiff issued bills of lading for the flour for shipment east. On the 1st day of October, 1867, Merritt took these orders, and went to defendants' mills and requested their acceptance; defendants' agent, who was in possession of the mills, wrote across the face of each order "accepted;" and Merritt states that the flour was assorted and counted out, and that the agent requested him to remove it, which he agreed to do. On the evening of the same day, Lamb & Quinlin suspended, and have ever since been insolvent; and on the next morning, one of the defendants called on the plaintiff and informed it that, as the flour had not been paid for, it would not be delivered. On these facts the Circuit Court gave judgment for the defendants.

It is contended by the counsel for the appellant that when the flour was counted and the orders accepted, the delivery was complete, and a right of property immediately vested in the purchaser. As it is not shown that there was anything said when the purchase was made about payment, the law presumes the sale was for cash; and in such a case payment and delivery are immediate and concurrent acts, and the vendor has the indisputable right to refuse to deliver without payment. Admit that the counting out and separation amounted to a constructive delivery, so as to vest title in the vendee and make the property at his risk, still actual delivery and change of possession could not be coerced till payment was made. There may be a delivery which will pass the title, but while possession is retained the lien will not be destroyed. This whole subject was considered and the more important cases collated in the *Southwestern F. & C. P. Co. v. Stanard*, 44 Mo. 71; and the principle stated in that case need not be here repeated. But it is attempted to distinguish this case from, and take it out of, the operation of the doctrine laid down in *Stanard's* case, on the ground that the rights of a third party — a sub-purchaser — had intervened. The strongest authority that can be found to sustain this view is *Whitehouse v. Frost*, 12 East, 614. In that case the contract was as follows: "Mr. J. Townsend bought of J. & L. Frost ten tons of Greenland oil, in Mr. Stainforth's cisterns, at your risk, at £39 — £390." There were then in the cistern forty

tons of oil which had belonged to Dutton & Bancroft, and they sold ten tons of it to Frost & Co., and these were the ten tons which the latter sold to Townsend, giving Townsend an order on Dutton & Bancroft for "the ten tons of oil we purchased from you, 8th November last." The order was taken to Dutton & Bancroft by the purchaser, and accepted by them in writing on the face of the order. Townsend left the oil in the custody of Dutton & Bancroft, and it was not severed from the bulk in the cisterns. It was held that the property had passed as between Frost and Townsend. But, in their opinions, none of the judges put the case on the reason that the sub-purchaser had any greater rights than the original purchaser himself. They considered that as the oil was not in the possession of the vendors, their order on their bailees, and its acceptance by them, constituted a complete delivery. Lord Ellenborough placed his judgment on the ground that all right in the seller was gone by the acceptance of his delivery order in favor of Townsend—the seller never having had himself the possession, but only the right to demand possession from the bailees, which right he had assigned to Townsend. Grose, J., was of opinion that as the risk was in the buyer, and the delivery complete so far as the vendor was concerned, the property had passed. It was the purchaser's business to act with Dutton & Bancroft in drawing off the ten tons of oil. Le Blanc, J., put it on the ground that the sale was complete between Frost and Townsend, because nothing remained to be done between them. It will be seen that the important matter which arises here in regard to detention for the unpaid purchase money, when the vendor was in possession, was not an element in that case, and hence it does not bear out the appellant's views. Moreover, as to the question of delivery, the case stands alone. It has been explained away, doubted, and denied by the whole current of English adjudication. (See it criticised in Benjamin on Sales, 242.) That a sub-vendee, or a third party to whom an order is given for the delivery of goods, even though the order is accepted, has no rights greater than, or superior to, the person from whom he derives title, is abundantly established. (*Miles v. Gorton*, 2 C. & M. 504; *Tanner v. Scovell*, 14 M. & W. 28.)



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If the vendor had the possession or the right of detention for the unpaid purchase money, he would still retain that right notwithstanding the assignment or transfer.

Now, in the present case, the right to the possession of the flour did not pass to Lamb & Quinlin till the purchase money was paid. They ordered the sellers to deliver the flour to the plaintiff instead of themselves, and the sellers agreed to so deliver it; but that did not deprive them of the right to retain it till their demands were satisfied. They agreed to deliver to plaintiff, instead of Lamb & Quinlin; but this did not change their contract, nor were their rights thereby either affected or impaired.

Judgment affirmed. Judge Bliss concurs. Judge Currier, having been of counsel, not sitting.

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THE STATE OF MISSOURI, TO THE USE OF LEOPOLD STEINBERGER,  
Appellant, v. JACOB SCHULEIN *et al.*, Respondents.

1. *Fraudulent conveyances—Purchase of goods procured upon credit by the vendor from a third party, upon fraudulent representations made by the vendee, effect of.*—Where the creditor of a firm in failing circumstances made such false representations to a third party as to induce him to sell goods to the debtor upon credit, and the original creditor afterwards obtained these goods in payment of his pre-existing debts, *held*, that although a clear case of liability in a direct action thus arises against him, he is not, therefore, incapacitated to purchase the goods.
2. *Fraudulent conveyances—Stock in trade—Change of possession.*—When the original merchants are employed as clerks after the sale, there should be such marks of change that customers would be advised that the store had a new proprietor. (*Claffin v. Rosenberg*, 42 Mo. 439, affirmed.)

*Appeal from St. Louis Circuit Court.*

H. A. Haeussler, for appellant.

The fourth instruction for respondent is fatal in stating that it must be such a change-of possession or control of the property as to indicate or show to persons or purchasers at large that the vendees, Waterman & Bruckheimer, were no longer in possession or control of the goods, and that such visible and exclusive pos-



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session commenced at the time of sale, or within a reasonable time thereafter; whereas all the law requires is some open, notorious, or visible act, as would impart notice to a prudent man (42 Mo. 450), or persons that were accustomed to deal with the store, that a change had taken place. The instruction was entirely too broad, and misled the jury in saying "persons or purchasers at large;" this would include everybody that had never before dealt with the parties. There is nothing in the Rosenberg case (42 Mo. 439) which seemed, at trial, to be the main reference of the court in the giving and refusing of instructions to warrant the court in refusing this instruction. (42 Mo. 444; 43 Mo. 593.)

*Krum, Decker & Krum*, for respondents.

I. The instructions given to the jury, taken all in all, fairly put the issues involved to the jury. The issues were: fraud in fact, of which the purchaser had notice, and fraud in law.

II. The statute declares that every sale of goods made with the intent either to hinder or delay or defraud any creditors, shall be void as to such creditors. Although a valuable consideration be proved, yet if one of the motives of the seller is to hinder or delay or defraud any creditor, this intent avoids the sale where the purchaser had knowledge of such intent. (*Potter v. McDowell*, 31 Mo. 62; *Potter v. Stevens*, 40 Mo. 229.)

III. *Nemo ex proprio dolo consequitur actionem* (Broom's Leg. Max. 266 *et seq.*) is applicable to the case made in this instruction, which is supported by the evidence. It is a fraud in morals and in law to allow Steinberger to acquire a title to the goods which were obtained by his own fraud, and to permit the very claim, the concealment of which constituted the fraud, to be now set up as the lawful valuable consideration, against the very party who, by his concealment, parted with these same goods. (*Viele v. Goss*, 49 Barb. 96; *Bean v. Wills*, 28 Barb. 467; *Brown v. Montgomery*, 20 N. Y. 387; *Bennett v. Judson*, 21 N. Y. 238.)

IV. The instructions upon this point are strictly in conformity with the law and the repeated decisions of this and other courts upon similar statutes. (*Clafin v. Rosenberg*, *supra*; *Lesem*

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v. Hereford, 44 Mo. 323.) This court has held that there must be a substantial change of possession; that a concurrent possession with the vendor is colorable; that there must be an exclusive possession of the goods; that the vendee's possession can not be formal or temporary, but must be open, notorious, and unequivocal; that there must be a complete change of dominion and control over the goods, and not a joint or concurrent possession. That such real, open, exclusive possession did not exist here, is admitted by plaintiff himself.

BLISS, Judge, delivered the opinion of the court.

Schulein, Sulzbacher and Hyman obtained judgment against Waterman & Bruckheimer, and levied upon certain goods as their property. Steinberger, for whose use this suit is brought, notified the sheriff that he claimed the goods, whereupon defendants executed a bond under the statute. The goods were sold and the bond returned with the execution, and suit is brought upon it. Waterman & Bruckheimer, the execution defendants, were merchants of St. Louis, and, shortly before the judgment was rendered, sold, or pretended to sell, their stocks of goods, both in this St. Louis store and in one in Rocheport, to said Steinberger in payment of a large indebtedness owing him for money loaned. The defendants claim that the sale was fraudulent, first, because they were induced to give said Waterman & Bruckheimer the credit upon the false representations of Steinberger as to their solvency; second, because the sale was made to defraud creditors, and also because it was not accompanied by a change of possession.

Judgment was rendered for the defendants; and I find an instruction given at their instance that will not bear scrutiny, which was, in substance, that if Waterman & Bruckheimer, being then indebted to Steinberger, obtained their credit of Schulein & Co. through the false and fraudulent representations of said Steinberger, and afterwards he obtained the goods bought upon such credit in payment of their said debt to him, and if the property sold under the execution was the same or part of the same so bought by Steinberger, the jury should find for defendants.

The evidence is quite clear that Steinberger introduced Water-

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man to Schulein & Co. in New York, and represented his firm to be good, when he knew they were in failing circumstances—when they owed him over \$12,000, and only lived by his sufferance—and that they obtained the credit on the strength of this recommendation. A clear case is thus made of liability in a direct action against him. But does it follow that upon that ground he is incapacitated to purchase the goods? I imagine the person who drew the instruction had more in his mind than is embraced in it. He might have supposed from the evidence that the jury would believe that the recommendation to Schulein & Co., and the purchase by Waterman & Bruckheimer, were but parts of one conspiracy to enable the latter to obtain the property for the purpose of paying their debt to Steinberger, and he might have intended to cover that ground. But the instruction does not go so far, and I know of no case that would sustain it.

I see no substantial error in the other instructions, though some of them are a little questionable in relation to a change of possession. That subject is fully and clearly considered in *Claffin v. Rosenberg*, 42 Mo. 439, and the meaning of the statute can hardly be misunderstood. When the original merchants are employed as clerks after the sale, there should be such marks of change that customers would be advised that the store had a new proprietor.

For the error of the instruction spoken of, the judgment must be reversed and the case remanded for a new trial. The other judges concur.

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WILLIAM RAPP, Respondent, v. JOHN C. VOGEL, Appellant.

1. *Replevin*—*Profits and losses shown is no proof of ownership, etc.*—A. may have been the owner of, and entitled to the possession of, certain goods, notwithstanding that B. was interested in the profits of the sales. And in replevin for the goods against a sheriff, the jury were improperly instructed to find for defendant if, at the time of seizure, B. was owner of the property, or interested in the profits to be realized from the sale thereof.
2. *Partnership property seized by creditor of one partner*—*Partners in interest ascertained.*—The interest of a partner is subject to seizure by his private creditors, and the measure of his interest can be determined in the trial of a replevin suit for the property.

*Appeal from St. Louis Circuit Court.*

*Krum, Decker & Krum*, for appellant.

I. The solvent partner can not maintain replevin for partnership property against the sheriff. His right to replevin does not exist. (*Wiles v. Sheriff*, 26 Mo. 78; *Phillips v. Townsend*, 4 Mo. 101; *Broadwater v. Darne*, 10 Mo. 277; *Gartside v. Nixon*, 43 Mo. 138; *Gray v. Parker*, 38 Mo. 165.)

II. The value of the goods must be found for the sheriff, if the jury find the issue of title against plaintiff. (Gen. Stat. 1865, p. 665, §§ 11-13; *Smith v. Winston*, 10 Mo. 299; *Berghoff v. Heckwolf*, 26 Mo. 512; *Fallon v. Manning*, 35 Mo. 271.)

III. Replevin is strictly a legal proceeding, in which equitable interests or rights of co-tenants can not be adjusted, nor can a partnership account be taken. (*Pawley v. Vogel*, 42 Mo. 303.) Where the pleadings admit that plaintiff is the general owner, very different rules necessarily apply. (*Dilworth v. McKelvy*, 30 Mo. 149.) *Dilworth v. McKelvy* is fully explained in *Fallon v. Manning*, 35 Mo. 271, and *Vogel v. Frei*, 40 Mo. 149.

IV. An interest in the profits of a joint adventure renders the parties liable as partners to third persons. (*Read v. Hollinshead*, 4 B. & C. 867; *Bancher v. Cilley*, 38 Maine, 553; *Myers v. Field*, 37 Mo. 439.)

*F. A. & L. Gottschalk*, for respondent.

An interest in profits to be realized from the sale of goods does not give any interest in the goods themselves. (*McCauley v. Cleveland*, 21 Mo. 438; *Hargrave v. Conroy*, 4 C. E. Green, cited in *Am. Law Reg.*, April, 1869, p. 253; *Whitehill v. Shickle*, 43 Mo. 537.)

CURRIER, Judge, delivered the opinion of the court.

The plaintiff sues in replevin to recover possession of certain personal chattels which the defendant, as sheriff, had levied upon and taken into his custody as the property of one Julius Rapp.

The property consisted of a small stock of goods valued at \$1,000 or thereabouts. The testimony given at the trial, bearing upon the question of ownership of the goods, was conflicting—that for the plaintiff tending to show that he was the sole owner, and that for the defendant tending to show that Julius Rapp was the sole or principal owner—the business being carried on in the name of William Rapp, as the defendant's testimony tended to show, because of Julius Rapp's insolvency, and with a view to evade the latter's creditors.

Among other instructions given at the instance of the defendant was the following: "If the jury believe from the evidence that Julius Rapp, at the time of the levy of the execution, was the owner of, or had any interest in, the profits to be realized from the sale of the goods, the jury should find the issue for the defendant, although they may also believe from the evidence that the business and store was carried on in the name of William Rapp." This instruction is justly complained of as erroneous and misleading. The plaintiff may have been the owner of and entitled to the possession of the goods, as is averred in the petition, notwithstanding Julius Rapp's supposed interest in the profits of sales. The two things are not necessarily inconsistent. The instruction authorized the jury to found their verdict upon an entirely immaterial issue. Besides, there was no testimony tending to show that Julius Rapp had an interest in the profits of sales, apart from his interest in, or ownership of, the goods themselves. If Julius Rapp had any interest in the store, so far as the testimony tends to show, it was either as a partner or sole owner. If Julius Rapp was either a partner or sole owner, his interest was subject to seizure by his private creditors. If a partner, the measure and value of his interest could be ascertained and determined in the trial of the replevin suit. (See *Gillham v. Kerone*, *ante*, p. 487.)

The judgment of the Circuit Court at general term, reversing the judgment of the court at special term, is affirmed. The other judges concur.

THE MERCHANTS' BANK, Respondent, v. P. A. BERTHOLD,  
Appellant.

1. *Bills and notes—Protest, notice of—Forwarding—Proof as to res gestæ.*—

In a suit against the indorsers on a promissory note, when a controversy arose as to the time and manner of forwarding the notices of protest, the declarations of one who delivered them to defendants, made at the time of delivery, were sought to be introduced in evidence, although it did not appear how he came by them, or that the notary delivered them to him, or had ever seen or heard of him. *Held*, that such declarations were not to be regarded as *res gestæ* in connection with the forwarding of the notices, and were inadmissible.

*Appeal from St. Louis Circuit Court.*

*Garesche & Mead*, for appellant, cited 1 Greenl. Ev., § 108, 12th ed.; *Field & Beardslee v. Liverman*, 17 Mo. 218; *Crowther v. Gibson*, 19 Mo. 366; *Webster v. Canmann*, 40 Mo. 156; *Morrison v. Hancock*, *id.* 561; *Gay v. Gay*, 5 Allen, 157; *Sessions v. Little*, 9 N. H. 276; *Featherman v. Miller*, 45 Penn. 96; *Tobin v. Shaw*, 45 Maine, 347; *Hall v. Jones*, 37 N. H. 144; *Tucker v. Peaslee*, 36 N. H. 181; *Beardslee v. Steinmesch*, 38 Mo. 168; *State, to use of Clendenin, v. Schneider*, 35 Mo. 536.

CURRIER, Judge, delivered the opinion of the court.

The defendants are residents of St. Louis, and are sued as the indorsers of a negotiable promissory note payable at St. Genevieve, Missouri. The note matured and was protested for non-payment, May 24, 1867. The notary who protested the note testified that he mailed the usual notices to the defendants on the day of the protest, inclosed in envelopes addressed to the defendants at St. Louis. The notices and envelopes were produced in court and identified by the notary as those forwarded by him from St. Genevieve; but there were no marks upon them indicating that they had ever passed through the post-office. The defendants testify that they received the notices in St. Louis, June 8th, fifteen days after the protest; that they were delivered to them by a party not known to them, but who was connected with a steamboat running between St. Genevieve and St. Louis,



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and who was not a mail carrier ; that they had been unable to find this party, although diligent search had been made for him, as was testified. The defendants then offered to put in evidence his declarations made at the time of the delivery of the notices, which, on objection, the court excluded, and the defendants excepted. This is the only point presented for consideration.

The defendants insist that the excluded evidence should have been received as constituting a part of the *res gestæ*. Treating the declarations as verbal acts connected with the delivery of the notices, they might possibly be regarded as *res gestæ*, or a thing done in connection with that particular fact. But that is not the point. The principal fact material to this cause is not the delivery, but the forwarding of the notices. If they were duly forwarded from St. Genevieve, that is sufficient ; and that was the point of inquiry. In order to make the declarations of the party who delivered the notices evidence under any circumstances, as bearing upon the act of forwarding, it was indisputably necessary to connect him with that particular act. There is no such connection shown. He had the notices in possession, but how he came by them does not appear. It does not appear that the notary delivered them to him, or that the notary ever saw or heard of him. Under these circumstances there is no view of the case that can render the declarations in question competent evidence. As bearing upon the question of forwarding, no rational distinction can be drawn between these declarations and other merely hearsay testimony.

The judgment must consequently be affirmed. The other judges concur.

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THE STATE OF MISSOURI, Plaintiff in Error, v. THE BANK OF THE STATE OF MISSOURI, Defendant in Error.

1. *The State Bank act not in conflict with section 6, article 9, of the State constitution.*—Section 6 of the act touching the State Bank (Sess. Acts 1865, p. 16) is not in conflict with section 6, article 9, of the State constitution. That the act provided that the purchase money arising from the sale of the stock held for school purposes by the State might be paid in the bonds and

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coupons of the State, does not necessarily make it an investment in either State bonds or obligations. The State had the undoubted right to sell, and it was responsible to the school and seminary fund for the price which it received growing out of the sale; but if it took in payment its own indebtedness, and replaced the amount in money from the treasury, there would be nothing objectionable in the transaction.

2. *Act of March 5, 1866, touching State Bank, relates to but one subject.*—The act touching the State Bank is not in conflict with section 32, article 4, of the State constitution. The reorganization of the bank, the selling of the stock, and the investment of funds were all matters intimately connected and blended, and had a natural coherence and congruity, and might be well combined in the same bill.

3. *Act touching State Bank—Sale of stock by agent appointed by the State—Authority must be strictly followed—Caveat emptor—Ratification by governor—Fact that State loses nothing, no argument for sale.*—The intention of section 5 of the act of March, 1866, touching the State Bank, was to advise the public that, up to a certain time, proposals might be made for the purchase of the stock held by the State, and that all should come in open, free, and fair competition, and to guard against unfairness and preclude the possibility of connivance and fraud. And a sale by the agent of the State, after the time advertised and without notice, amounted simply to a private sale in total disregard of the law. In such a state of facts, *held*, as follows:

1. The sale was not within the authority committed to the agent, and was not binding on the State.

2. The agency being conferred by statute and growing out of it, must be ascertained from the statute, and can not be varied or enlarged.

3. When the agent is specially appointed by the State for the sale, the purchaser is presumed to know his authority; and if he purchases in a case where that special authority is not pursued, he purchases at his peril.

4. The ratification of the sale by the governor, without the action of the Legislature, would not validate the contract. The governor himself was merely an agent, and incapable of confirming the act.

5. The fact that the purchaser was the highest bidder does not affect the case. *Non constat* but the offer, notwithstanding, was insufficient; and in that case the proposal should have been rejected and the property again advertised according to law. To sanction the doctrine that one may make a contract with a public agent in known violation of law, and then hold its benefits on the ground that the State has suffered no loss, is of modern invention, and fatal to public interests.

4. On motion to stay execution on judgment against the bank for the amount of dividends due on the stock, *held*, 1st, that said motion could not be granted on the mere suggestion of other stockholders; 2d, that the fact that third persons purchased the stock, believing that the purchaser had good title, would not avail them. He could only purchase such title as he himself possessed, and his title was acquired under a law which every person was bound to know and construe at his peril.

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*Error to St. Louis Circuit Court.*

*Wingate*, for the State.

I. No valid sale of the stock in question could be made by the agent appointed to make sale thereof, under act of March 5, 1866, unless he complied strictly with the requirements of the act. The attempt on the part of Fogg to dispose of the stock without notice to the public, as required by the act, was such an abuse as rendered the whole proceeding void. (Sedgw. on Stat. and Const. Law, 347, 350-5, 687; Paley on Agency, 178-9, 202, 212-14; 8 Paige, 527; 7 Hill, 431; 26 Wend. 192; Blackf. on Tax Tit. 35-40, 54-7; Sto. on Cont. 67-8, § 70.)

II. Fogg, in receiving and reporting Eads' proposal, and in notifying Eads of its acceptance; the governor, in approving the same and transferring the stock; the treasurer, in receiving and receipting for the bonds and coupons paid by Eads, were but agents of the State charged with the performance of administrative functions, and therein powerless to dispose of the stock or bind the State, except when acting in strict accordance with the requirements of the law.

III. The act in question is a public law; and the bank, Eads, and all others claiming rights under it, are chargeable with notice of its provisions.

*H. B. Johnson*, Attorney-General, for the State.

I. The decisions upon constitutional provisions similar to ours all tend to the conclusion that the Legislature has no power to divert any portion of a common school fund from the purpose for which the same was created or appropriated, much less to dispose of such fund in a manner having the effect of depleting and destroying such fund. (Morton *et al.* v. Grenada Male and Female Academies, 8 Sm. & M. 773; State v. Trustees, etc., 11 Ohio, 24; State v. Newton, 5 Black, 445; Bush v. Chapman *et al.*, 4 Scam. 186; Trustees for Vincennes University v. State of Indiana, 14 How. 268.)

II. The sale was without notice and void. (Gibbs v. Shands,

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17 Wis. 197; Gill v. Given, 4 Metc., Ky., 197; Russell v. Dyer, 40 N. H. 173; Com. Dig. 11-15; Sto. on Agency, § 165; North River Bank v. Aymar, 3 Hill, 262; Tate v. Evans, 7 Mo. 419; Denning v. Smith, 2 Johns. Ch. 244; Sto. on Agency, 307, *a*; Lee v. Monroe, 7 Cranch, 36; Curtis v. United States, 2 Nott & Hun. 144; Baltimore v. Reynolds, 2 Md. 1; State v. Hastings, 10 Wis. 518; Hull v. County of Marshall, 12 Iowa, 142; Brady v. City of New York, 20 N. Y. 312; Delafield v. State of Illinois, 26 Wend. 192; The Floyd Acceptances, 7 Wall. 666.)

III. The sale being void, it is not necessary to institute a direct proceeding to set it aside. It may be impeached collaterally.

*Glover & Shepley*, and *Burnes*, for defendant in error.

I. The transfer of the stock having been made by the governor under the act, will be held to be conclusive as to the regularity of the proceedings until the plaintiff shall by proper proceedings set the sale aside.

II. So long as the plaintiff holds possession of the consideration received for the stock, to which these dividends are an incident, it is not competent to prove that the sale was void either from irregularities in the sale or on grounds derived from the language of certain provisions of the constitution in relation to school and seminary funds.

III. But even if, as against the purchaser, the approval of the governor was not conclusive, yet the Legislature, as if to provide for the very case, inserted a provision in the act which shows that, upon the transfer being made on the books of the bank, it should be conclusive as between the bank and the State.

IV. The sale, as made (if this was a proceeding to set aside the sale as invalid), is not invalid by reason of the purchase having been made with bonds of the State of Missouri instead of treasury notes.

V. The act of the Legislature is not unconstitutional, as embracing more than one subject.

VI. The sale is not invalid by reason of any supposed irregularity of the acts of the agent. The governor is the sole and

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exclusive judge of the regularity of the proceedings. Indeed, all the other acts are merely preliminary to the act of the governor, who is to decide whether a sale shall be effected or not. If this were, what it is not, a proceeding instituted to set aside this sale, yet no recovery could be had under any proof that might be adduced so long as the State has not, prior to suit, offered to return the bonds she received from the purchaser in payment of his purchase.

WAGNER, Judge, delivered the opinion of the court.

The controversy in this case grows out of the question as to who is rightfully entitled to certain dividends arising out of shares of stock of the defendant, a corporation. The facts in the case appear to be briefly these :

The plaintiff, as trustee of the school and seminary fund, and in its own right, held and owned a large number of shares of stock in the bank. On the 30th day of June, 1866, dividends on those shares were declared to the amount of \$104,410.75. On the 26th day of July, 1866, the governor, and also the treasurer of the State, demanded of the bank payment to the State of the dividends due upon the stock above mentioned, and payment was refused on the ground that the stock was claimed by James B. Eads. The real contest is between Eads and the State ; the bank has no interest in the question, and its answer, therefore, substantially performs the office of an interpleader. The authority whence the alleged sale to Eads took place, together with the subsequent proceedings thereon, is derived from an act of the Legislature approved March 5, 1866. (Sess. Acts 1865, p. 14.) The act is entitled "An act to authorize the Bank of the State of Missouri to reorganize as a national bank, to provide for the sale of the stock owned by this State in said bank, and to protect the seminary and common school fund and provide for its safe investment." The first three sections of the act make provision for reorganizing the State Bank into a national bank. In the event of the reorganization, the fourth section gives the governor power to appoint a competent agent in behalf of the State to sell the stock owned by the State in its



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own right, and as trustee for the seminary fund and the common school fund. Section 5 declares that immediately after his appointment said agent shall proceed to cause said stock to be advertised for sale in one or more newspapers published in the cities of St. Louis, Boston, New York, and Philadelphia, for the period of not less than thirty days; and shall invite sealed proposals for the purchase of said stock, or any part thereof, and from such proposals said agent shall report to the governor those which offer in good faith the largest price and the terms most advantageous for the State; and if, in the opinion of said agent, any of said proposals so received shall appear to be the fair value of said stock, he shall mention the fact in said report; and if such proposal shall be approved by the governor, the whole or any part of said stock may be sold accordingly, in which event the person or persons submitting said proposal shall be notified by said agent of the acceptance of his or their said proposals; and within thirty days after such notice the said purchaser or purchasers shall pay or deliver to the treasurer of this State the money or other securities, as hereinafter provided, to the amount of his or their said proposals; and the treasurer shall give his duplicate receipts, one of which shall be filed with the auditor, therefor; and upon the production of this receipt the governor shall assign and transfer said stock on the books of said bank, and said bank shall issue to such purchaser or purchasers a certificate or certificates therefor, which said certificates shall be taken and considered as a complete cancellation of all claim or interest in behalf of the State, and of said several funds for which said stock is now held; and the holder or holders of such certificates shall be entitled to all the rights and privileges and subject to all the liabilities now enjoyed by the private stockholders in said bank, or to which they are entitled; provided, however, that no such sale shall be valid until submitted to and approved by the governor in writing. The sixth section provided that the bank stock, so owned by the State, in its own right or as trustee for the seminary and school fund, should be sold only for money or the bonds of the State then due or thereafter to become due, or the coupons of any such bonds, at the option of the purchaser or purchasers.



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The seventh section made it the duty of the treasurer, as soon as practicable after the sale was completed, to invest the proceeds received from the sale of the stock held for the benefit of the common school fund, and that held for the benefit of the seminary fund, in the interest-bearing bonds of the United States; and it was declared that until the same should be so invested the State should be held and considered the debtor of the said several funds, and the treasurer should pay to said several funds, out of any money then in the treasury, the interest on the full amount of the several funds, at the rate of six per cent. semi-annually.

In pursuance of the authority given in the fourth section, the governor appointed Josiah Fogg as agent on the part of the State to make sale of the stock, who caused an advertisement to be inserted in the newspapers that he would receive sealed proposals for the purchase of said stock, or any part thereof, until 12 o'clock m. of Monday, June 4th, 1866. Under this advertisement bids were received within the time limited by the terms thereof, and Fogg says that the highest was duly forwarded to the governor; but it does not appear from the record that it ever reached him, or that any action was taken upon it.

On the 12th of June, 1866, and without any notice or advertisement, according to the terms of the law, Fogg received from Eads a proposal to purchase the entire amount of the stock at the sum of \$108.50 per share, payable in the bonds and coupons of the State. This proposal was certified by Fogg to the governor, with a recommendation that it be accepted, and was approved by the governor, and Eads notified in due time of its acceptance. Eads paid into the treasury the bonds and coupons, and the governor then transferred to him the certificates of stock. This transfer was dated on the 20th of July, 1866. It is admitted that the bonds and coupons still remain in the State treasury, and have never been returned to Eads. Upon the foregoing facts the Circuit Court gave judgment for the defendant, and the plaintiff prosecuted her writ of error.

It is now claimed by the plaintiff in error that the act authorizing the sale of the stock was unconstitutional and void: first, because it was in conflict with section 6 of the ninth article of

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the constitution of this State ; and, secondly, because it violated the thirty-second section of the fourth article of the constitution.

It is further insisted that the sale was void because the agent abused his trust in receiving the bid privately, and that he had no power whatever to receive or entertain any proposal unless it was made in compliance with law, on published notice, when the proposition was open to free competition. Several minor objections have been raised, but the above points are the main ones, and all that we deem it necessary to discuss.

The sixth section of the ninth article of the constitution provides that no part of the public school fund shall ever be invested in the stock or bonds or other obligations of any State, or of any county, city, town, or corporation ; but that the stock of the Bank of the State held for school purposes, and all other stock belonging to any school or university fund, shall be sold in such manner and at such time as the general assembly shall prescribe ; and the proceeds thereof, and the proceeds of the sales of any land or other property which belongs, or may hereafter belong, to such school fund, may be invested in the bonds of the United States.

By this constitutional provision, the Legislature was empowered to sell the stock held for school purposes, and invest the proceeds in the bonds of the United States ; but it was prohibited from making the investment in the stock or bonds or other obligations of any State, city, town, or county corporation. That the act provided that the purchase money arising from the sale of the stock might be paid in the bonds and coupons of the State, does not necessarily make it an investment in either State bonds or obligations. The State had the undoubted right to sell, and it was responsible to the school and seminary fund for the price which it received growing out of the sale ; but if it took in payment its own indebtedness, and replaced the amount in money from the treasury, I do not see that the transaction was objectionable, and it is very certain that the school fund did not suffer in consequence. It is agreed by both parties that the State has appropriated and set aside for school purposes the full amount in cash ; and such being the case, we see no reasonable ground of complaint in this regard.

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The next question relates to a subject which has been before this court on several occasions on cognate points. The constitution says that no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title; but if any subject embraced in an act be not expressed in the title, such act shall be void only as to so much thereof as is not so expressed. (Const. Mo., art. 4, § 32.)

In giving a practical construction to this section, this court has heretofore held that it was not its design to embarrass legislation by compelling a needless multiplication of separate bills, but that it was only the intention to prevent the conjoining in the same act of incongruous matters, and of subjects having no legitimate connection or relation to each other. (*City of St. Louis v. Tiefel*, 42 Mo. 578; *State v. Matthews*, 44 Mo. 523.)

In the State of New York, where a similar provision prevails, the question came up in the following manner: By the first section of "an act for the relief of the creditors of the Lockport and Niagara Falls Railroad Company," it was made the duty of the president of the corporation, or one of the directors to be appointed by the president, to advertise and sell the real and personal estates, including the franchises of the company, at public auction, to the highest bidder. It was then declared that the sale should be absolute, and that it should vest in the purchaser or purchasers of the property, real or personal, of the company, all the franchise, rights, and privileges of the corporation, as fully and as absolutely as the same were then possessed by the company. The money arising from the sale, after paying costs, was to be applied first to the payment of a certain judgment, and then to other liens, according to priority; and the surplus, if any, was to be divided ratably among the other creditors; and then, if there should be an overplus, it was to be divided ratably among the then stockholders. By the second section of the act, it was declared that the purchaser or purchasers should have the right to sell and distribute stock to the full amount which was authorized by the act of incorporation and the several amendments thereto, and to appoint an election, choose directors, and organize a corporation anew, with the same

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power as the existing company. There was then a proviso that nothing in the act should impair the subscriptions for new stocks, or the obligations or liabilities of the company which had been made or incurred in the extension of the road from Lockport to Rochester, etc. The whole act was held to be constitutional. (*Mosier v. Hilton*, 15 Barb. 657.)

Now the title of the act in question was to authorize the Bank of the State of Missouri to reorganize as a national bank, to provide for the sale of the stock owned by the State in said bank, and to protect the seminary and current school fund and provide for its safe investment. The constitution had given the Legislature power to sell the school and seminary fund, and reinvest the same. When the authority was delegated to the bank to reorganize under the national banking system, it was deemed best to sever all State connection with it, and it was therefore necessary that the State's funds should be disposed of. The reorganization, the selling of the stock, and the investment of the funds were all matters intimately connected and blended, and had a natural coherence and congruity, and might, in my opinion, be well combined in the same bill. The next question is, whether the agent, in receiving the private bid of Eads long after the time when proposals could be legally received under the published notice, and when competition was ended, renders the sale void. There is no pretense that Fogg acted in compliance with the law; the counsel for the defendant does not venture to assume such a position. The law provided that the agent, immediately after his appointment, should proceed to cause the stock to be advertised for sale, for a period of not less than thirty days, and should invite sealed proposals for the purchase of the stock, and from such proposals the agent should report to the governor those which offered in good faith the largest price, etc. The requirements of the law are plain, and the intention is apparent. It was to advise the public that up to a certain time proposals might be made for the purchase, and that all should come in open, free, and fair competition. The evident design was to guard against unfairness and preclude the possibility of connivance and fraud. But in the course pursued the law was

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totally disregarded, and the transaction was simply a private sale between Fogg, the agent, and Eads, the purchaser. Is the State, as principal, bound by the act of the agent?

The rule is universal that, in order to bind the principal upon a contract made by an agent, the contract must be within the authority committed to the agent, and that the authority must be strictly followed. If the agent's acts vary substantially from his authority, in nature or extent or degree, they are void as to the principal, and do not bind him. (Com. Dig. 11, 14, 15; Sto. on Agency, § 165; North River Bank v. Aymar, 3 Hill, 262; Wahrendorff v. Whittaker, 1 Mo. 205; Tate v. Evans, 7 Mo. 419.) There is another rule founded in reason and often applied, that when the agency is created or conferred by a written instrument, and grows wholly out of it, the nature and extent of the authority must be ascertained from the instrument itself, and can not be varied or enlarged. Judge Story says if the agent exceed his special or limited authority, "the principal is not bound by his acts, but they become mere nullities so far as he is concerned." There are cases where usage, acquiescence, or ratification will vary to some extent the rules, but the principle which governs them will be hereinafter adverted to.

A party who contracts with an agent of the government, whose power is derived from, marked out, and defined by a statute, is bound to know and take notice of the agent's authority. In the case of an officer specially authorized to sell certain lands by statute, Chancellor Kent applied the rule, and held that "the special authority must be strictly pursued, and the purchaser is presumed to know that special authority, for it is contained in the act; and if he purchases in cases in which that special authority was not pursued, he purchases at his peril." (Dennings v. Smith, 2 Johns. Ch. 244; Sto. on Agency, § 307, *a*; Lee v. Munroe, 7 Cranch, 36; Curtis v. United States, 2 Nott & Hun. 144; Baltimore v. Reynolds, 2 Md. 1; State v. Hastings, 10 Wis. 518; Hull v. County of Marshall, 12 Iowa, 142.)

"By the law of agency, at the common law there is this difference between individuals and the government: the former are liable to the extent of the power they have apparently given to



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their agents, while the government is liable only to the extent of power it has actually given to its officers." (Per Loring, J., in *Pierce v. United States*, 1 Nott & Hun. Ct. of Claims, 270.) This rule is absolutely necessary to protect the public interest against losses and injuries arising from the fraud, mistake, or rashness or indiscretion of public agents. A learned writer in 4 Am. Law Review, 1, sums up the doctrine as follows: "The first question to be asked by one who purposes contracting with the government, is whether the officer has full power to make a binding agreement; not merely whether he is a public officer, but whether, as a public officer, he is authorized to make this particular contract upon the terms proposed. Private agents, who, as agents, are held out to the public, by a well-known principle of law, will bind their principals when they act apparently within the scope of their authority. Those who deal with them are not bound in every case to examine their instructions. The presumption is that the contract was properly made, and it rests upon the principal to give notice to third persons when he means to limit his own liability. But with public agents it is essentially different. Their fundamental duties are defined by statute, and all are bound to notice the limitations to their authority. And in contracts of importance, the statute prescribes provisions and limits the expenditure. Of all this the contractor is conclusively presumed to be informed; and wherever the public agent exceeds his authority, the government is not bound by his acts."

This subject recently received a most thorough consideration in the Supreme Court of the United States, in the important case of the Floyd acceptances. The question arose whether the secretary of war could bind the United States by accepting bills of exchange without authority. The transaction was unquestionably fraudulent. The bills were drawn by army contractors, and passed into the hands of third parties without notice of the fraud. It was customary for army contractors to draw such bills upon the government for funds, but there was no authority for the custom. The court pronounced the acceptances worthless so far as the United States was concerned, and declared that under our system of government the powers and duties of all its officers



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are limited and defined by law. (The Floyd Acceptances, 7 Wall. 666.)

The case of *Delafield v. The State of Illinois* (26 Wend. 192; 2 Hill, S. C., 159) is in some respects like the case at bar, and in principle entirely the same. There the State of Illinois passed a law for the borrowing of money, and authorized its governor to issue and sell bonds or certificates of stock for the amount borrowed, declaring, however, that the stock should not be sold for less than its par value, and empowering the governor to appoint agents to effect the loan; and a loan was effected upon the terms that the money should be paid by installments and at deferred periods, but that the interest should commence immediately upon the whole sum; and certificates of stock were issued and delivered to the lender. It was held by the Court of Errors that the contracts were not obligatory upon the State, because the agents had exceeded their authority: first, in selling the stock upon credit; and, secondly, in agreeing that the interest should commence running previous to the advance of the money, thus virtually selling the stock for less than its par value, and that therefore the State was entitled to a return of the certificates of stock. It was further held that the approval by the governor of the acts of his agents, the receipt and appropriation of a portion of the proceeds of the certificates, and other acts of acquiescence of executive officers of the State, were not enough to amount to a ratification of the contracts; that they could be ratified only by the Legislature; and as it appeared that the Legislature disavowed the contracts and took measures to recover back the certificates, all pretense of ratification failed. And it was also said by the court that consent or ratification of the doings of the agent might be presumed from the acts or omissions of the principal. Where, however, a State was the principal, acts and omissions, which in the case of an individual would be deemed sufficient to authorize the presumption, would not be so held.

As a further illustration of the invalidity of contracts made by an officer or agent, where he has not pursued strictly the power under which he assumes to act, reference may be had to the case

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of *Brady v. The City of New York*, 20 N. Y. 312. That was a case where certain work was let out to be done by the street commissioners, whose duty it was, under the law, to advertise and receive proposals for the same. The law prescribing the manner in which bids should be received was as follows: "All work to be done and all supplies to be furnished for the corporation, involving an expenditure of more than \$250, shall be by contract, founded on sealed bids, or on proposals made in compliance with public notice for the full period of ten days; and all such contracts, when given, shall be given to the lowest bidder, with adequate security."

The bid was not made in conformity with the law, though it was accepted, and the party proceeded and performed the work. Afterwards the common council confirmed the illegal contract; but the court held that the contract was void, and that the confirmation did not give it any validity as against the corporation.

The act amending the charter of the city of New York, said Denio, J., "established a system by which all work to be performed for the city, which should cost more than \$250, should be subjected to public competition, and should be given out to the party who would undertake to do it for the smallest amount of money. It was based upon motives of public economy, and originated, perhaps, in some degree of distrust of the officers to whom the duty of making contracts for the public service was committed. If executed according to its intention, it will preclude favoritism and jobbing, and such was its obvious purpose. It does not require any argument to show that a contract made in violation of its requirements is null and void." And again, the learned judge continued: "The action of the common council, in confirming the assessment roll, can not aid the plaintiff upon any principle with which I am acquainted. That body could not make the contract originally; and if a lawful one has not been made by the officer to whom that duty was committed by law, it can not be helped out by any resolution of the council."

It is insisted in argument that the approval of the governor was conclusive, and that we can not go behind his action; but this is preposterous. The State, by her legislative act, expressly

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prescribed the manner in which the stock should be advertised and sold. The reasons why the terms in a case like this should be literally complied with, readily suggest themselves to every mind. The agent violated the requirements of the act. The governor himself was but an agent, and he would have had no power to make the contract in the manner pursued by Fogg; and he was therefore incapable of confirming or ratifying it. (*The People v. The Phoenix Bank*, 24 Wend. 431, and cases hereinbefore referred to.) Nothing short of an express act of the Legislature can validate a contract made in contravention of a statutory law. Nor can it be said that the State has acquiesced in the contract; for immediately after it was consummated the attorney-general, the law officer of the State, commenced this proceeding, claiming that it was utterly void. In this he was sustained by the Legislature, for that body passed a resolution authorizing him to continue the prosecution.

But it is contended that the contract should be upheld because the State lost nothing by it; that the last bid upon which the sale was made was higher than any proposal received by the agent when they were regularly put in. Eads, it is said, made the highest proposition when proposals were being received under the published notice up to the 4th of June; and after that time, when the agent was no longer acting under any recognized authority, he privately advanced the rate, and the last was accepted. The answer to this is, that the simple fact that the first proposal was made was no evidence that the person making it would thereby obtain the stock. If the offer was not sufficient and did not amount to a fair valuation, the duty of the agents acting for the State was plain: they should have promptly rejected the proposals and proceeded again to advertise, in accordance with the law, and opened the matter up to a fair rivalry and free competition. Besides, this doctrine that a person may make a contract with a public agent in known violation of law, and then hold its benefits on the ground that the State has suffered no loss, is purely of modern invention, and finds no support in the rugged and sturdy principles of jurisprudence, as they were formerly recognized. To sanction such a thing would be destructive and fatal to

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the public interests. It would be, indeed, establishing a pretty precedent. Upon every view of the case the contract must be held void. The agent had no authority for his action; this fact was known to Eads; the law was before them both.

The judgment of the Circuit Court must therefore be reversed, and final judgment entered in this court for the plaintiff. The other judges concur.

On motion to modify judgment, WAGNER, Judge, delivered the opinion of the court.

The counsel for the defendant appears, and moves this court to modify the judgment heretofore rendered in this cause by adding thereto an order that no execution shall be issued thereon until sixty days after the meeting of the next general assembly of this State. The reasons assigned for the motion are that the sale of the stock in the bank, owned by the State and held by her, to James B. Eads, is declared by the decision to be void, and that the State is entitled to recover of the defendant the dividends upon the stock in July, 1866; and that, as the governor transferred to Eads, upon the books of the defendant, the said shares of stock in said bank, held by the State, which transfer the defendant could not control, and had no means of preventing; and as Eads, shortly after the sale and transfer of the stock to him, sold for value, and transferred on the books of the bank to third persons, most of the shares, which persons were without any knowledge or notice or reason to believe that the sale was in any manner illegal—the defendant, in consequence of the sales and transfers aforesaid, now finds itself in the position to be subject to a suit by the State for the dividends on the stocks earned subsequent to the dividends which were the subject-matter of this suit, and which dividends subsequently earned have been paid over to Eads and the purchasers from him; and that the defendant is also subject to a suit both by the State and by said Eads, and the purchasers from him, for dividends which shall hereafter accrue.

It is then further stated that the State still holds the bonds and coupons paid by Eads for the purchase of the stock, and that he

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will apply to the next Legislature to rescind the sale and recover back the bonds ; that the interest of the stockholders (other than those owning the shares of stock in controversy) are seriously affected by a controversy which neither they nor the bank are parties to, or have anything to do with, and against the consequences of which they can not protect themselves.

As regards the last proposition, it is not perceived upon what grounds the interference of this court can be invoked. The stockholders stand in the exact situation of any other parties whose interests are incidentally affected by proceedings in which they do not appear of record. But it was never supposed that the course of justice should be stayed or judgment arrested in consequence thereof upon their mere suggestion. I know of no principle or precedent to justify such a course.

And the first reason included in the motion is equally untenable. That third persons purchased the stock, believing that Eads had a good title, will not avail them in this case. Eads could only transfer such title as he himself possessed, and his title was acquired under a law which every person was bound to know and construe at his peril. The statute under which the sale was had was a public act, and imparted notice to all. The bank does not aver ignorance or want of notice in these purchasers from Eads, but only states the fact so far as it knows. It is no ground to interfere now, because the bank fears that it may be subjected to future litigation and liability. We speak of the bank only, because it alone is a party to the record, and we can notice no other person as having a standing here. The bank was apprised of the circumstances attending the sale, and knew that the State claimed the dividends, and that the suit was instituted asserting the invalidity of the sale. Its proper course, then, before it paid anything, would have been to have the rights of the parties adjusted by an interpleader. Whatever may be the existing equities between the State and the party to whom the stock was transferred, we can not undertake to decide.

The State, as much as a private person, is bound in faith and honor to do justice ; but we have no authority to impose terms and conditions upon her. To attempt to arbitrarily stay an



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execution, under the circumstances of this case, and upon the suggestion that parties not of record may be affected thereby, would be setting a most dangerous precedent, and would be entirely unauthorized.

The motion will be overruled. The other judges concur.

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**BARTLETT ADAMS *et al.*, Appellants, v. HENRY A. HOMEYER,**  
Respondent.

1. *Contracts—Boats and vessels—Charter-party—Ownership for the voyage—Owner's lien.*—The owner of a vessel who is also the carrier has a lien upon goods for their transportation, but it does not follow that he who has the title to the property employed in the transportation is necessarily the owner for the voyage. The proprietors of a steamboat or ship, as well as of other property, may lease the same, give up all possession and control, reserving only rent; and in that case the lessee, although the lease assume the form of a charter-party, becomes the owner for the term. The charter-party, instead of a contract of assignment, becomes but a demise; and the temporary owner may carry for others, and they are responsible to him.
2. *Contracts—Boats and vessels—Charter-party, construction of—Possession of vessel.*—The general owner may let his ship with a master and crew of his own choosing, and if there is evidence of intention to part with the possession, it is held to be a demise. But a covenant that he shall have the right to appoint the master to control and navigate, clearly indicates an intention not to trust the property in the hands of others, but to control it by his own agents for the use of the charterers; and he is to be considered as retaining possession.
3. *Contracts—Boats and vessels—Charter-party, terms of, presumed to be known to parties having dealings with the vessel.—Semble,* that persons contracting with the charterer of a vessel must be presumed to know the terms of the charter-party.
4. *Boats and vessels—Charter-party—Right of master to freights—Implied contract against consignees who receive goods transported.*—Whatever stipulations may have been made between the consignees of a cargo and the charterer of a vessel which transports them, for the appropriation of the return freights, the right of the master to collect them from the consignees after delivery to them of the goods, at least to the amount due on the charter-party, can not be questioned. The delivering of the goods to the consignees, and their acceptance of them under the bill of lading, raises an assumpsit against them to pay freights according to the stipulations of the bill of lading. And this implied obligation becomes a positive one when the goods are received with notice that the freights must be paid to the master, and not to the charterer.



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*Appeal from St. Louis Circuit Court.*

*M. L. Gray*, for appellants.

The suit was based on bills of lading in the usual form, by which the boat was to deliver the goods shipped to defendant's consignee, he paying freight therefor. Defendant, receiving said goods under such bills of lading, was bound to pay the freight thereon. (2 Sumn. 604; Abbott on Shipping, 177-8; 3 Kent, 138; Olcutt's Adm. R. 149; 1 Pars. Mar. Law, 219, ch. 7, § 8.) The main question is, who had possession, command, and navigation of the ship? 1. The owners under the charter-party were in possession to command and navigate the boat, and were entitled to collect the freight as a consequence thereof. 2. If this is not so, the evidence shows that Capelle failed to pay the running expenses of the line, and, by the terms of the contract, plaintiffs were entitled to resume their rights, and did so; by which the owners, and not Capelle, were entitled to the freight earned by the boat on the trip in question.

I. The owners, having their own captain on board, commanding and running the boat, must be considered to be in possession. It is true, Capelle was to pay the rest of the crew; but the crew were under control of the captain, and were bound to obey him. (Abbott on Shipping, *supra*.) The clauses in the charter-party which declare that Capelle shall deliver the boat and barges to the owners, or, in certain events, he shall be relieved from delivering the boat and barges to the owners, must be construed in connection with the one that the owners are to have their own captain to command and run the boat. The whole must be construed together. (1 Pars. Mar. Law, 232-3.) But if there is a doubt which party was to have possession under the charter-party, that doubt must be resolved in favor of the owner. (2 Sumn. 597.) 1 Sumn. 566-9, bears directly on this point. "Where the general owner retains possession, command, and navigation," etc., "the charter-party is considered as a mere affreightment sounding in covenant." (Marcardier v. Chesapeake Ins. Co., 8 Cranch, 49; Gracie v. Palmer, 8 Wheat. 605, 632-3;

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3 Kent, 137-8, and note; 2 Brod. & Bing. 434, 440, 443; 1 Johns. 229; 5 Sandf. 97; 1 Paine, 358; 4 Cow. 470; Pars. Mar. Law, 232, ch. 8, § 2; 3 E. D. Smith, 390.)

II. There was evidence showing that Capelle broke his covenants to keep the boat supplied with money to defray running expenses; that he failed to do so. He also failed to pay the hire-money of eighty-five dollars per day, which had become due before the return of the boat to St. Louis. By the terms of the charter-party, a failure to furnish money for the running expenses, or to pay the hire of the boat every fifteen days, gave the owners of the boat a right to terminate the agreement, which they did by notice to Capelle, on the boat's return, about the 6th of November, 1865. Plaintiff's fourth instruction reads as follows: "If performance by Capelle of his covenants in the charter-party would take away the rights of plaintiffs to collect the freight on the goods carried, yet if the court, sitting as a jury, shall find from the evidence that Capelle failed to perform said covenants, and that thereupon plaintiffs notified him and defendants, before the goods were delivered, that the freight must be paid to plaintiffs alone, or their order, then plaintiffs were entitled to collect said freight, and verdict must be for plaintiffs." This instruction should have been given. (4 Barn. & Ald. 630-640 *et seq.*) Defendant, dealing with Capelle, must be presumed to know the terms of the charter-party. (Olcutt's Adm. R. 144-8.)

*Krum & Decker*, for respondent.

Where the owner or freighter leases his vessel and gives control of it, as well as the direction of the voyage the ship shall make, to the party leasing the same, he defraying expenses of navigating the vessel—in such case the hirer becomes the owner for the voyage, and is responsible for the conduct of the master and mariners; and the general owner has no lien for the freight, because he is not the carrier for the voyage. (Abbott on Shipping, 248-289; 3 Kent, 220-1.) The clause giving the owners the right to select the captain to run the steamer and the man to look after the barges, does not conflict with our position,

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and can not be construed into a retention on the part of the owners of the possession and control of the boat and barges. It was plainly the intention of the parties that Capelle should have full and complete control of boat and barges, not only from the character of the service in which they were to be employed, but the intention is made more apparent by the clause in the charter-party, by which Capelle agrees to deliver said boat and barges to the owners at the close of the navigable season, etc. Contracts of this sort should be construed liberally, agreeably to the intention of the parties, conformably to the usage of trade in general, and of the particular trade to which they relate. (Abbott on Shipping, 250-274, and cases cited.) As no custom or usage of trade in general or particular is shown, the court must look to the agreement itself to ascertain the intention of the parties. (Drinkwater v. Brig Spartan, Ware, 149; Clarkson v. Ellis, 4 Cow. 470; Pickman v. Woods, 6 Pick. 248; Lander v. Clark, 1 Hall, 375; Winsor v. Cutts, 7 Greenl. 261; Houston v. Darling, 16 Maine, 413; Colvin v. Newberry, 6 Bligh, N. S., 189; McIntyre v. Bowne, 1 Johns. 229.) The action and conduct of the parties furnish their own interpretation of the agreement or charter-party. There is no forfeiture shown of the charter-party by reason of any neglect or failure of Capelle. The testimony on this point is balanced, and this court will not, in the absence of proof, assume that Capelle failed to perform his agreement with the plaintiffs, nor does the record show that he desired to forfeit the agreement.

BLISS, Judge, delivered the opinion of the court.

On the 12th of October, 1865, the plaintiffs and one Francis K. Capelle executed a charter-party, of which the following is a synopsis: The plaintiffs charter to Capelle, to run during the balance of the season, upon the Upper Mississippi, the steamer Resolute and three barges; they agree and claim the right to provide the captain "to command and run" the steamer, and to furnish a man to take charge of and manage the barges, both of whom are to be paid by the plaintiffs. Capelle is to keep sufficient money in the hands of the clerk to pay expenses, which are

to be paid promptly, and no debt for supplies, fuel, wages, or other liabilities against the steamer or barges is to be suffered to accumulate or to remain unpaid. Capelle is to insure the steamer for the benefit of the plaintiffs; is to pay plaintiffs "for the use and hire" of the steamer and barges eighty-five dollars per day, to be paid every fifteen days, until the charter is "terminated by the delivery of said steamer and all of said barges" to the plaintiffs, or until it is otherwise terminated. In case of loss or injury by the dangers of navigation, so as to render the steamer unfit for navigation and render the insurance company liable, Capelle may deliver to the plaintiffs the barges, "pay up the hire of said steamer and barges to the date of said delivery," and be discharged from liability for loss "and for further hire." Upon failure to pay expenses or liabilities of steamer or barges, or to keep it insured, or "to pay the hire" as stipulated, Capelle's rights under the charter are to be forfeited, and plaintiffs may, during the continuance of such failure, terminate the charter "and resume possession of said steamer and barges." Capelle is to deliver them to the plaintiffs at St. Louis, at the close of navigation, in good condition, unless the steamer shall be lost, when "he shall be discharged from all liability to deliver said steamer as aforesaid."

Shortly before the execution of said agreement, Capelle had agreed in writing to transport for defendant a quantity of wheat, at a given price per bushel, from the Upper Mississippi to St. Louis. As soon as he obtained the boat, he sent it above for the wheat—Griffith, the captain, having been placed on board by the owners, according to the charter. Capelle advanced \$1,000 to pay expenses, and the evidence tended to show that he agreed to furnish more money at the bridge at the upper rapids, which he failed to do, and the captain drew on defendant for \$1,000.50 and for \$375; and some bills for coal, etc., were left unpaid. It was also shown that on the arrival of the boat in St. Louis, Capelle came aboard, and Captain Griffith demanded for the owners, under the charter-party, money to pay the hands and the charter hire of the boat, and notified Capelle that unless these sums were paid he would not let the shipment go out of the

owners' hands ; but Capelle paid nothing, and thereupon plaintiffs put into the hands of W. B. Russell & Co. the business of delivering the merchandise and collecting the freight for the owners ; that defendant paid Russell & Co. some \$400, but refused to pay any more, claiming that he had paid the remainder to Capelle in his contract with him. There was also testimony tending to show that Capelle had complied with his contract, and that defendant refused to pay the drafts of the master upon him until authorized by Capelle.

The plaintiffs claim that they had a lien upon the wheat shipped for defendant for the freight or hire due them, which lien is not affected by the charter to Capelle ; also, that the charter was forfeited by his fault, and that he lost all right to collect the freight which he might have possessed under it. That the owner and carrier has a lien upon goods for their transportation is nowhere disputed, but it does not follow that he who has the title to the property employed in the transportation is necessarily the owner for the voyage. The proprietors of a steamboat or ship, as well as of other property, may lease the same, give up all possession and control, reserving only rent ; and in that case the lessee, although the lease assumes the form of a charter-party, becomes the owner for the term. The charter-party, instead of a contract of affreightment, becomes but a demise ; and the temporary owner may carry for others, and they are responsible only to him.

This subject has been often before the courts of England and of this country, and the various rulings in the former are collected in chapter 2, part 4, of Abbott's Shipping. There does not seem to be perfect clearness and consistency in all the different cases, though, as affecting the question of lien, the above distinction between a demise and contract of affreightment is kept up throughout. Conceding that the owner for the voyage possesses this lien, the same difficulty in the construction of the charter-party has arisen on the American cases. The general owner, unless the contrary appears from the contract, must of necessity be considered the owner for the voyage ; but he is competent to part with this ownership temporarily by demise, as well as permanently by absolute sale. In *Marcadier v. Chesapeake*



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Ins. Co., 8 Cranch, I find on page 49 a description of this ownership which is often quoted in other cases: "A person may be the owner for the voyage," says the court, "who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command, and navigation of the ship. But if the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo as freight for the voyage, the charter-party is considered a mere affreightment sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership." Who, then, by the charter under consideration, had the exclusive possession, command, and navigation of plaintiffs' boat?

In the construction of contracts of this kind there is nothing peculiar or technical, but, as in all other agreements, the intention of the parties is our polar star; and I confess that the intention in this regard seems more obscure than in any agreement of the kind that has fallen under my observation. I have given a correct abstract of all its provisions, and, while some seem to contemplate a possession by Capelle, others provide that the owners shall retain the possession and navigation. Their right to furnish the captain "to command and run the boat," and the man to take charge of the barges, show that the general owners did not intend to give up the control of their property, and a contrary intention can not be inferred from other parts of the agreement unless it unequivocally appears. Such intention can not be inferred from the fact that they were to receive a per diem for the use of their boat; for they may have as real a possession while running it in that manner as though receiving pay by weight or measure of the property shipped. Nor can it be inferred from the fact that the charterer is to pay the running expenses, for he may do that and still leave the owner in possession. On the other hand, the peculiarity of the contract in this respect would seem to imply that the charterer was not in possession; for, instead of a general agreement to pay the expenses, he is not to disburse the money, but is to keep a sufficient deposit with the clerk for that purpose, indicating that it was to be disbursed by those in charge of the boat. Nor can anything be



inferred from the repeated use of the term "hire," for the word may as well apply to the price for services as of a lease.

It is claimed, however, that the different provisions in the charter for delivering up possession to the owners are conclusive upon the question. They are certainly sufficient to throw doubt upon what would otherwise have been perfectly plain; and unless the whole instrument shows that these provisions have another meaning than what alone they would naturally import, we must be compelled to hold that the charterer was to take actual possession. But when we find that the owners covenanted to furnish the men who should command and navigate both the boat and the barges, and when we also find the construction given by the acts of the parties in the fact that the master acted throughout as the agent of the owners in complying with their contract and endeavoring to enforce a compliance with his stipulations by the charterer, all strengthening and supporting the presumption of ownership, we are compelled, if possible, to find some other meaning consistent with the other provisions of the charter and with its practical interpretation.

What, then, must the parties have intended by the language used by them in relation to the surrender of possession at the termination of the contract? Clearly and only that at the time and on the occasions referred to, the contract should end; that the owners should then have the independent use and control, absolved from any obligation to run and carry exclusively for the charterer. This meaning renders the whole instrument, and the action of the parties under it, consistent and harmonious; while the one contended for would require that Capelle, who never was in actual possession, should yield possession to the owners, who had all along, by their own officers, though for Capelle's use, been running the boat and barges.

There are some authorities that seem to support the defendant's view, that the plaintiffs parted with their possession, and hence that they lost their lien for the freight. *Halton v. Bragg*, 7 Taunt. 14, is no longer considered as authority, and need not be considered. The most favorable American case that I have found is *Drinkwater v. Brig Spartan*, 1 Ware, 149. By the

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charter in that case, the owners let to freight the whole vessel, with appurtenances, the charterers to pay a monthly hire thirty days after the end of the voyage, pay all charges, and deliver her to the owners on her return to port. The owners relied upon the fact that one of them was named in the charter as at present master, as showing that the intention was not to part with the possession; but this master did not sail, and the charterers appointed a new master; and the court held the charter to be a demise, and not a contract of affreightment.

In *Pickman v. Wards*, 6 Pick. 248, the charterer was held to be the owner for the voyage, principally from the fact that he was allowed to appoint the master. In *Lander v. Clark*, 1 Hall, 355, the lien for freight is denied upon the ground that "the charter-party was an absolute demise of the ship for the voyage, and transferred the whole ownership of her *pro hac vice* to the charterer;" it appearing that the charterer, and not the owner, appointed the master, and otherwise controlled the ship.

The general owner may let his ship with a master and crew of his own choosing, and if there is evidence of intention to part with the possession, it is held to be a demise. But a covenant that he shall have the right to appoint the master to control and navigate, clearly indicates an intention not to trust the property in the hands of others, but to control it by his own agents for the use of the charterer. Cases seldom turn upon this provision alone, but it must always have great weight in arriving at the intention of the parties in regard to the constructive possession. (See *Winsor v. Cutts*, 7 Maine, 261; *The Schooner Volunteer*, 1 Sumn. 551; *Certain Logs of Mahogany*, 2 Sumn. 582.)

Light may be thrown upon this question by considering the responsibility for loss or damage. Suppose, by the fault of the master, the cargo had been damaged, or a collision had occurred destroying another boat, whose agent would the master have been considered, and who would be compromised by his acts? Would he represent the charterer who had no power over his appointment, or the owners who placed him in command, and who alone had power to keep him or remove him?

The owners, then, should have a lien upon the goods for the

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stipulated freight, not to exceed the amount due from the charterer, and not to exceed what the defendants are owing under their freight contract. It is no defense that Capelle was owing them or that they have paid him. They shipped "per steamer Resolute, Griffiths, master," and knew with whom they were dealing, and the rights of carriers. "The respondents must be presumed to know the terms of the charter-party, and that they could not deal with the charterer as owner of the vessel for the voyage, her entire possession and control being reserved to the master and owners." (Shaw v. Thompson, Olcutt's Adm. R. 148.) "Whatever stipulations may have been made between the defendants and the charterer for the appropriation of the return freights, the right of the master to collect them from the consignees after delivery to them of the goods, at least to the amount due on the charter-party, can not be questioned." (*Id.*) "The delivery of the goods to the consignees, and their acceptance of them under the bill of lading, raised an assumpsit against them to pay freight according to the stipulations of the bill of lading. And this implied obligation becomes a positive one when the goods are received, as in this instance, with notice that the freight must be paid to the master, and not to the charterer." (*Id.* 149; see also Faith v. East India Co., 4 Barn. & Ald. 630.) The above quotations from Shaw v. Thompson leave nothing to be said in regard to defendant's liability in this form of action.

But there is evidence showing that defendant has paid various sums, either directly to plaintiffs or upon drafts by the master, amounting to some \$1,900, with which he should be credited. Also, there are indications that the \$1,000, paid by the charterer upon the running expenses, might have been advanced for that purpose by the defendant. If so, he should also be credited with that sum; for it would be clearly inequitable to refuse to appropriate money advanced for the use of the boat in liquidation of its claims for freight.

The Circuit Court, in its instructions to the jury, took a different view of the questions discussed in this opinion, and its judgment is reversed and the cause remanded. The other judges concur.

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Hull v. Voorhis et al.

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WILLIAM C. HULL, Respondent, v. CORNELIUS VOORHIS *et al.*,  
Appellants.

1. *Administration—Executor can not purchase at his own sale for himself or others.*—That a trustee, such as an executor, etc., can not become a purchaser or interested in a purchase, at his own sale, is too well and thoroughly settled to permit discussion. And the same rule applies with almost equal force to the employment of the auctioneer or trustee to make bids for the purchaser.
2. *Administration—Sale of real estate by executor—Decree obtained by fraud.*—Where an executor obtained a decree for the sale of real estate of his decedent by representing that such sale was necessary to pay the debts of the estate, one of the principal creditors being a minor heir of the decedent, who had no guardian, and the executor having purchased a large part of the other debts at a large discount; and where the debt due the minor heir had never been probated, and the real estate sought to be sold, in which this minor as an heir was interested, was sure to increase in value, making it more for his interest to receive the land ultimately than to receive the proceeds realized by an immediate sale—*semble*, that such a state of facts would show that the decree was obtained by fraud upon the court, and be alone sufficient to entitle the heir to have the sale under such decree set aside.
3. *Administration—Purchase by executor of debts against the estate—To whom the benefits belong.*—An executor has no claims against an estate for the face of claims which he purchases at a discount. He may so purchase, but not for himself; and all his transactions in that regard should be treated as for the estate, whose agent and servant he is.

*Appeal from St. Louis Circuit Court.*

*Voorhis & Mason, and Moody, for appellants.*

Under our statute (R. C. 1855, p. 147, § 32), an executor might bid at a sale conducted by himself, under some circumstances, even for himself. There was, therefore, no fraud in law in his bidding *per se*, if he had bid for himself; much less where he bid for a third party, under written directions. This supposed rule, that an executor can not in good faith and at a fair public sale cry the bid of an absent purchaser, under written instructions made known to all other bidders, is a rule without a reason. (Richards v. Holmes, 18 How. 143, 148; Lucas v. Oliver, 34 Ala. 626, 631; Talliaferro v. Minor, 1 Cal. 531; 2 Am. Law Reg., N. S., 705-713.)

*Berry and Holliday*, for respondent.

I. The evidence shows that the executor was interested in the purchase of the real estate. The court was, therefore, right in setting aside the sale. (*Davone v. Fanning*, 2 Johns. Ch. 252; *Michoud v. Girod*, 4 How. 503; 1 White & Tud. Lead. Cas. in Eq. 201, note; *Law of Trusts and Trustees*, Tiff. & Bull. 149, 483-4.)

II. The executor was the auctioneer at the sale, and, while acting as auctioneer, bid in the real estate and conveyed the same to his partner, Hellmer. The auctioneer was incapacitated to bid for his co-defendant, more especially while acting as auctioneer, and without declaring the name of the party for whom he was bidding and buying. (*Ex parte Bennett*, 10 Ves. Jr. 381; *Hawley v. Cramer*, 4 Cow. 717; *Davone v. Fanning*, 2 Johns. Ch. 252; *Thornton v. Irwin*, 43 Mo. 153; *Richards v. Holmes*, 18 How. 143.) If an executor desires to buy at his own sale, he must do so under sections 32 and 33, Gen. Stat. 1865, p. 499. It was impossible in this case; the property went below the appraisement. (Sto. on Agency, 254, § 211, note 4; 1 Pars. on Cont. 75, 4th ed.; 1 White & Tud. Lead. Cas. in Eq. 196, 210; *Hunt v. Bass*, 2 Dev. Ch. 292.) There was fraud in law; there was fraud in fact. (*McNair v. Hunt*, 5 Mo. 300.) "The general rule is that a party can not purchase on his own account that which his duty or trust requires him to sell on account of another. He can not be both buyer and seller." (*Smith v. Williams*, 12 Mo. 109.) Persons thus intrusted, and thus assuming to act for the benefit of others, can not act for themselves so long as the ordinary signification attaches to ordinary words. (*Wasson v. English*, 13 Mo. 176; *Charleville v. Chouteau*, 18 Mo. 492; *Jamison v. Glascock*, 29 Mo. 191; *Lich v. Bernecker*, 34 Mo. 93; *Boardman v. Florez*, 37 Mo. 559; *Beal v. Harmon*, 38 Mo. 435; *Thornton v. Irwin*, *supra*; *Thomas v. Zumbalen*, 43 Mo. 471; *Grumley v. Webb*, 44 Mo. 444; *Allen v. Ranson*, 44 Mo. 263.)



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BLISS, Judge, delivered the opinion of the court.

The plaintiff is the sole heir of Joseph S. Hull, deceased, and defendant Voorhis was his executor. The testator died in July, 1859, the plaintiff being but twelve years of age. He was also the principal creditor of his father, inasmuch as the decedent, as his guardian, had appropriated the child's estate received from his mother. In 1864 the executor obtained from the Probate Court an order for the sale of certain real estate of decedent, for the payment of his debts, being about thirty acres near the fair grounds of St. Louis county, laid out into town lots, and known as Hull's Subdivision, in Grand Prairie common fields.

In applying for the order of sale, he made an exhibit of the estate, and showed that it was indebted to the plaintiff in the sum of \$12,310.85, being said guardian's debt, and to other creditors in the sum of \$8,771.89, and claimed that it was necessary to sell this land to pay said debts. But the petition did not show that there was any necessity whatever of selling land that was constantly rising in value, in order to pay the boy, who had no guardian, and whose claim had never been presented for allowance; and it also failed to show that of the other debts all but \$1,626 belonged to the executor, about \$4,000 of which he had purchased at fifty cents on the dollar.

The sale was made at auction in November, 1864, and nearly all the property was bid in, in the name of defendant Hellmer, the business partner of Voorhis, and the deed was made to him. The entry of the transaction upon the partnership books would, taken alone, indicate a partnership interest in the purchase, though it is denied by the partners and book-keeper; but it does not appear that, down to the commencement of this suit, any money had been paid by Hellmer on account of the purchase. It is, however, clear that at the sale the executor and auctioneer were employed by Hellmer to bid for him; that a list of prices for each lot was placed in his hands, beyond which he was not to go; that he sought to get the property for Hellmer as low as possible, and finally succeeded in bidding in nearly all of it for less than the maximum proposed, and less than the appraisal.



Another improper commingling of cross-interests was exhibited at the sale, in the fact that Robert S. Voorhis, a brother of the executor, was his attorney and legal counselor in the matters of the estate, was also the attorney and agent of Hellmer at the sale, and was clerk of the auctioneer.

In 1867, Hellmer advertised the whole property for sale at auction; and before the time of the sale, the plaintiff, then nearly of age, by his next friend, commenced this suit to set aside the original sale to Hellmer, and, upon trial at special term, obtained a decree, which was affirmed at general term.

There is no doubt whatever as to the correctness of this decree. There may be doubt whether the evidence warranted the finding of the Circuit Court, that the executor was personally interested in Hellmer's purchase, although there are circumstances that strongly point in that direction; but the part acted by Voorhis, who, as executor, was under obligation to obtain the highest prices for the property honestly in his power, became also agent of the purchaser, and, as such, interested in obtaining the same property as cheap as possible, is just as fatal to the sale.

The main proposition that a trustee, as an executor, etc., can not become a purchaser or interested in a purchase at his own sale, is too well and thoroughly settled to permit discussion anew. Instances, however, have not as frequently arisen where the courts have been called upon to consider the effect upon the sale of the employment of the auctioneer or trustee to make bids for the purchaser. But in the cases that have arisen the courts have set their face against such a transaction with almost equal uniformity and decision as where the purchase was made by the trustee for himself.

*Ex parte Bennett*, 10 Ves. 381, was a case of bankruptcy, where the solicitor for the assignees and commissioners was employed to bid for an absent purchaser, and obtained the property for a little less than they were authorized to offer. No shadow of actual fraud rested upon the transaction, yet the Lord Chancellor, after considering the matter with great deliberation, and upon different hearings—if a want of deliberation can ever be predicated in any of Lord Eldon's cases—set aside the sale

upon the ground merely that those interested in the estate for the bankrupt acted in the interest of the purchaser; and I have seen no more recent case to contradict the principle of this decision. *Richards v. Holmes*, 18 How. 143, is claimed by defendant's counsel to have done so; but instead of that, Justice Curtis, in delivering the opinion, expressly recognizes the doctrine of *ex parte Bennett*.

The purchaser, who was the creditor, had sent to the auctioneer a specific bid, which was proclaimed by him, and, as no one bid higher, the property was struck off to him. There was no agency whatever on the part of the auctioneer incompatible with his duty, but he received the bid the same as though made by a bystander. Yet, lest the case might become a dangerous precedent, the judge remarks: "It must be remembered that the auctioneer was not employed as the agent of the creditor to purchase the property for him at the least price at which it could be obtained. Such an agency an auctioneer should not undertake. It is inconsistent with his relation to the seller, and with the faithful discharge of his duty to the seller." A plainer condemnation of the present transaction could not be given.

There are other elements in the case at bar that strongly condemn the action of the executor; and so close is the relation of the purchaser to him that I do not know but they alone would entitle the plaintiff to relief. The original order of sale was obtained by a fraud upon the court. A false exhibit was made of the estate. The executor had no claim upon the estate for the face of these claims he had purchased at a discount. He might so purchase, but not for himself; and all his transactions in that regard should be treated as for the estate, whose agent and servant he was. Nor should he have given in the debt due the young man as one of the reasons for the sale. It had never been probated, and, besides, it was clearly more for his interest to receive the property as heir and devisee, sure as it was to increase in value, than, as creditor, to be paid the proceeds of its sale. This order of sale comes before us collaterally, as it were, and we can not directly vacate it; but the application for the order shows that defendant Voorhis had an imperfect apprehension of

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his obligations as an executor, which might have blinded him to the impropriety of acting as agent of the purchaser, striving to obtain the property as cheap as possible, and actually striking it off for a less sum than the purchaser had offered, in writing, to give.

The other judges concurring, the judgment will be affirmed.

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PHILIP WEIGEL, Defendant in Error, *v.* THOMAS WALSH *et al.*,  
Plaintiffs in Error.

1. *Equity—Injunction allowable against trespasser, when.*—It is now a well-settled principle of equity jurisprudence that the remedy by injunction is allowable against a mere trespasser when the injury sought to be averted goes to the destruction of the inheritance, or is otherwise irreparable in its character. But the sole ground upon which an injunction is granted in such cases is that the trespass complained of operates such irreparable mischief that it is not susceptible of adequate compensation in the way of pecuniary damages; and the party seeking it must bring himself within this principle before he can be entitled to this remedy.

*Error to St. Louis Circuit Court.*

*Garesche & Mead*, for plaintiffs in error.

The case, if stated on plaintiff's own theory, is one of pecuniary damages. He had no longer any interest in the buildings as against the landlord. The remedy of defendant Weigel is adequate at law, and injunction therefore does not lie. (*Burgess v. Kattleman*, 41 Mo. 482.)

*Finkelnberg & Rassieur*, for defendant in error.

Whenever a trespass goes to the destruction of plaintiff's estate, he is entitled to an injunction. (*Herr v. Bierbower*, 3 Md. Ch. 458; *Shipley v. Ritter*, 7 Md. 413; *Jerome v. Ross*, 7 Johns. Ch. 332.) The same state of facts which would constitute waste as against a tenant, will justify injunctive relief as against a trespasser. The duration of plaintiff's estate, whether long or short, is not an element to be considered in the matter.

CURRIER, Judge, delivered the opinion of the court.

Although the doctrine is of modern origin, it is nevertheless now a well-settled principle of equity jurisprudence that the remedy by injunction is allowable against a mere trespasser when the injury sought to be averted goes to the destruction of the inheritance, or is otherwise irreparable in its character. (*Echelkamp v. Schrader*, *ante*, p. 505.) But the sole ground upon which an injunction is granted in such cases is that the trespass complained of operates such irreparable mischief that it is not susceptible of adequate compensation in the way of pecuniary damages. (*James v. Dixon*, 20 Mo. 79; *Burgess v. Kattleman*, 41 Mo. 480.) The plaintiff does not bring himself within this principle. It is not alleged that the defendants are insolvent, or that the alleged trespass is of such a character that it can not be adequately and fully compensated by an award of damages. The injury complained of goes only to the extent of the plaintiff's interest in a leasehold which had but two weeks to run. The evidence clearly shows that the plaintiff had, at the time of the alleged trespasses, then already vacated the premises and gone into another house, at the suggestion and for the convenience of his landlord, who was about to take down the old improvements for the purpose of rebuilding; or rather at the suggestion and procurement of the landlord's agents. There were negotiations between the parties as to the possession of the premises; the plaintiff swearing that his terms were never complied with or accepted, and the defendant, Walsh, swearing very positively that possession was taken after the premises were abandoned by the plaintiff, and in virtue of his express license and authority. Walsh testifies that the permission was granted upon his statement or suggestion to the plaintiff that Jacobs, the landlord, would compensate him for the two weeks' rent. There is a clear and direct antagonism between the witnesses on this point. The burden of proof is on the plaintiff, but it is not necessary to determine the preponderancy of this conflicting testimony. Granting that the defendants were in fact trespassers, the plaintiff, nevertheless, had an ample remedy against them in an

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action at law for the recovery of compensatory damages. In that way the plaintiff can be fully indemnified for the injury complained of. It would be idle to attempt to fix and maintain a rational and consistent limitation to the remedy by injunction, in cases of mere trespass, if that remedy is held applicable to the facts of the case before us.

The judgment will be reversed and the cause remanded. The other judges concur.

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SAMUEL F. BUEL and RUTH BUEL, Respondents, v. THE ST. LOUIS TRANSFER COMPANY, Appellant.

1. *Practice, civil—Petition—Amendment, when relates back—Limitations.*—Where an amendment to a petition in a suit for damages (Wagn. Stat. 519, § 2) sets up no new matter or claim, but is merely a variation of the allegations affecting a demand already in issue—as where, by the original petition, a party was assigned to the wrong side of the cause, and the mistake was corrected—it relates to the commencement of the suit, and the running of the statute is arrested at that point.
2. *Damages—Suit for, under statute—Father and mother as plaintiffs, divorce of.*—In a suit for damages under section 2, p. 520, Wagn. Stat., the father and mother of the deceased child may join as plaintiffs, although divorced prior to the accrument of the cause of action.
3. *Damages—Instruction—Phrase “undue carelessness.”*—In an action for damages, the phrase “undue carelessness,” in an instruction concerning negligence, is calculated to confuse and mislead the jury, and is proper ground for a reversal.

*Appeal from St. Louis Circuit Court.*

*Breckinridge & Clark*, for appellant.

The court below erred in allowing plaintiff to amend, because amendment changed substantially the claim and defense. It substituted a new and wholly different action for the old one. (30 Ga. 873, in U. S. Dig. 1866, No. 26, p. 360; *Miller v. McIntire*, 1 McLean, 83; 10 B. Monr. 83.)

*J. C. Morris*, and *Moodey and Hogan*, for respondents.

I. The amendment to the petition, making Samuel F. Buel a co-plaintiff instead of a co-defendant, was warranted by our



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statute, and did not operate as the institution of a new suit. (Gen. Stat. 1865, ch. 168, §§ 3, 5; Thompson *et al.* v. Morely, 29 Mo. 477.)

II. The word "undue" in plaintiff's instruction is surplusage, and conveys no stronger meaning than the word "negligence" standing alone. (McPheeters v. H. & St. Jo. R.R., *ante*, p. 22.)

III. The evidence offered by defendant, that the plaintiffs were divorced, was immaterial.

CURRIER, Judge, delivered the opinion of the court.

This is an action brought under the statute for the recovery of damages. (Wagn. Stat. 519, § 2.) It was originally instituted by the plaintiff, Ruth Buel, as the mother of a minor child, who is alleged to have been fatally injured through the carelessness of one of the defendant's servants. Subsequently to the filing of the petition, and eighteen months after the accruing of the cause of action, the petition was amended so as to introduce Samuel F. Buel, the father of the deceased child, as a co-plaintiff in the action. By the statute (Wagn. Stat. 520, § 6) this class of actions is barred in one year from the time they accrue. Unless the amendment, therefore, has relation to the commencement of the suit, and takes effect, as regards the limitation, from that date, then the action is clearly barred; for it can not be sustained as to one of the plaintiffs, and not as to the other. If either is barred, both are. (See authorities cited below.) Whether an amendment by relation takes effect from the commencement of the suit, or only from the time of its filing, depends on circumstances. The rule is this: where the amendment sets up no new matter or claim, but is a mere variation of the allegations affecting a demand already in issue, then the amendment relates to the commencement of the suit, and the running of the statute is arrested at that point; but where the amendment introduces a new claim, not before asserted, then it is not treated as relating to the commencement of the suit, but as equivalent to a fresh suit upon a new cause of action—the running of the statute continuing down to the time the amendment is filed. (Sto. Eq. Pl., § 904; Holmes v. Moreland, 1 McLean, 10; Miller's Heirs v. McIntire,



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*id.* 85; 6 Pet., S. C., 61; Dudley v. Price, 10 B. Monr. 88; Marsteller v. McLean, 7 Cranch, 156; Bradford v. Edwards, 32 Ala. 628; King v. Avery, 37 Ala. 169.)

In the case before us, the amendment, in our view, introduced no new claim or cause of action. It does not, in fact, even introduce a new party. Buel was originally joined as a defendant, as in a chancery proceeding, on the ground that his assent to becoming a co-plaintiff had not then been obtained. By the amendment his position was changed from that of a co-defendant to that of a co-plaintiff. That was all. The original petition set out the entire cause of action as fully as the second, and fully stated Buel's paternity of the child, and his title and interest in the subject of the suit. He was assigned, however, to the wrong side of the cause. The amendment simply corrected this mistake. It did not introduce any new matter. We think, therefore, that, under the rule already given, the amendment must be treated as having relation to the original commencement of the suit, thus rescuing the action from the statute bar.

There is no force in the objection that Mr. and Mrs. Buel, the plaintiffs, had been divorced prior to the accrument of the cause of action sued on. They do not sue as husband and wife, but simply as parents. The divorce did not affect the fact of parentage. The statute does not give the action to the husband and wife, as such, but to the father and mother, as the parents of the deceased minor. The circumstance of the divorce explains the fact that the suit was originally commenced by Mrs. Buel as a *femme sole*.

The objection taken to the plaintiffs' second instruction is well founded. It directs the jury that if they find certain facts, and also that the injury complained of, as occurring to the deceased child, did not result from any "undue carelessness" of the child or its parents contributing thereto, then the verdict should be for the plaintiffs. If the carelessness of the plaintiffs contributed to the fatal event, as its proximate cause, without which the event would not have occurred, then clearly the plaintiffs ought not to recover. This instruction on the subject of contributory negligence was unhappily phrased, and well calculated to confuse

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and mislead the jury. The endeavor of the plaintiffs' counsel in the argument was to explain and excuse, rather than to justify, the instruction as drawn and given. The epithet "undue," as used therein, was doubtless an inadvertence, occurring in the hurry of a trial, but that does not abate its tendency to confuse and mislead. The instructions for the defendant were sufficiently liberal; but the effect of correct instructions ought not to be impaired by others of an opposite tendency.

For aught the case shows, the jury may have understood the plaintiffs' second instruction as directing them to find for the plaintiffs, so far as the case turned on the question of contributory negligence, unless they found from the evidence that there was negligence on the part of the plaintiffs of a somewhat excessive and aggravated character, short of, but approximating, gross negligence.

The defendant's counsel have made a variety of points which we do not deem it necessary to explore, and therefore pass them without comment.

The judgment will be reversed and the cause remanded. The other judges concur.

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THEODORE WIENER and WIFE, Plaintiffs in Error, v. CHARLES A. STEPHANI, Defendant in Error.

1. *Conveyances, voluntary*—*Nothing presumed in favor of without change of possession.*—Courts can not presume anything in favor of a gift of land, although upon family considerations, further than it is followed by actual and unequivocal possession and improvements.

*Error to St. Louis Circuit Court.*

Garesche & Mead, and Beal, for plaintiffs in error.

Cline, Jamison & Day, for defendant in error.

BLISS, Judge, delivered the opinion of the court.

This is a petition to enforce a parol gift of a lot in Carondelet to Mrs. Wiener from her father, the defendant. The plaintiffs

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*id.* 85; 6 Pet., S. C., 61; Dudley v. Price, 10 B. Monr. 88; Marsteller v. McLean, 7 Cranch, 156; Bradford v. Edwards, 32 Ala. 628; King v. Avery, 37 Ala. 169.)

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There is no force in the objection that Mr. and Mrs. Buel, the plaintiffs, had been divorced prior to the accrument of the cause of action sued on. They do not sue as husband and wife, but simply as parents. The divorce did not affect the fact of parentage. The statute does not give the action to the husband and wife, as such, but to the father and mother, as the parents of the deceased minor. The circumstance of the divorce explains the fact that the suit was originally commenced by Mrs. Buel as a *femme sole*.

The objection taken to the plaintiffs' second instruction is well founded. It directs the jury that if they find certain facts, and also that the injury complained of, as occurring to the deceased child, did not result from any "undue carelessness" of the child or its parents contributing thereto, then the verdict should be for the plaintiffs. If the carelessness of the plaintiffs contributed to the fatal event, as its proximate cause, without which the event would not have occurred, then clearly the plaintiffs ought not to recover. This instruction on the subject of contributory negligence was unhappily phrased, and well calculated to confuse

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and mislead the jury. The endeavor of the plaintiffs' counsel in the argument was to explain and excuse, rather than to justify, the instruction as drawn and given. The epithet "undue," as used therein, was doubtless an inadvertence, occurring in the hurry of a trial, but that does not abate its tendency to confuse and mislead. The instructions for the defendant were sufficiently liberal; but the effect of correct instructions ought not to be impaired by others of an opposite tendency.

For aught the case shows, the jury may have understood the plaintiffs' second instruction as directing them to find for the plaintiffs, so far as the case turned on the question of contributory negligence, unless they found from the evidence that there was negligence on the part of the plaintiffs of a somewhat excessive and aggravated character, short of, but approximating, gross negligence.

The defendant's counsel have made a variety of points which we do not deem it necessary to explore, and therefore pass them without comment.

The judgment will be reversed and the cause remanded. The other judges concur.

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THEODORE WIENER and WIFE, Plaintiffs in Error, v. CHARLES A. STEPHANI, Defendant in Error.

1. *Conveyances, voluntary*—*Nothing presumed in favor of without change of possession.*—Courts can not presume anything in favor of a gift of land, although upon family considerations, further than it is followed by actual and unequivocal possession and improvements.

*Error to St. Louis Circuit Court.*

*Garesche & Mead, and Beal, for plaintiffs in error.*

*Cline, Jamison & Day, for defendant in error.*

BLISS, Judge, delivered the opinion of the court.

This is a petition to enforce a parol gift of a lot in Carondelet to Mrs. Wiener from her father, the defendant. The plaintiffs

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claim that in 1860 a gift of a lot 50 by 150 feet, on corner of Main and Quincy streets, was made, upon condition that they would build and live upon it; that they built upon the back end of the lot, where they have ever since resided, and have occupied the front as a garden. The defendant denies the gift or the possession of any portion, except the part upon which the building was erected, which he has conveyed to Mrs. Wiener. It is undisputed that after the building was erected a fence was run around it, inclosing 38 by 50 feet; that the deed for that parcel was received by Mrs. W., though she testifies that she did not examine it, and supposed that it was for the whole lot; but upon all other facts there is a glaring conflict of testimony. We can not presume anything in favor of a gift, although upon family considerations, further than it is followed by actual and unequivocal possession and improvements. (Tyler v. Eckhart, 1 Binney, 378.) It is very doubtful, from the evidence, who had possession of the garden, whether Mrs. Stephani, or her daughter, Mrs. Wiener; though one witness testifies that they worked it in common. In this conflict the presumptions are all in favor of the owner, and against the gift.

The judgment of the Circuit Court against the plaintiffs will therefore be affirmed. The other judges concur.

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JOHN WASHBURN, Respondent, v. DANIEL EATON, Appellant.

1. Judgment affirmed for want of assignment of errors, statement, or brief.

*Appeal from St. Louis Circuit Court.*

*N. A. Mortell*, for respondent.

*James B. Goff*, for appellant.

WAGNER, Judge, delivered the opinion of the court.

In this case there is no assignment of errors, statement, or brief.

The judgment will therefore be affirmed. The other judges concur.

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Banister et al. v. Henn.—Davis v. Staples et al.

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JAMES A. BANISTER *et al.*, Respondents, *v.* JOHN E. HENN,  
Appellant.

1. *Supreme Court—Damages—Ten per cent. allowed, when.*—When the record plainly shows that the appeal was taken for delay, and is destitute of merit, the judgment will be affirmed, with ten per cent. damages.

*Appeal from St. Louis Circuit Court.*

*T. A. & H. M. Post*, for respondents.

*John W. Colvin*, for appellant.

WAGNER, Judge, delivered the opinion of the court.

In this case the appellant has filed neither assignment of errors nor brief. The record plainly shows that the appeal was taken for delay, and is destitute of merit.

The judgment will therefore be affirmed, with ten per cent. damages. The other judges concur.

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JOSEPH DAVIS, Appellant, *v.* CHARLES W. STAPLES and P.  
O'CONNELL, Respondents.

1. *Executions—Garnishment—Justice's court—Jurisdiction—Judgment against garnishee before return day of writ.*—The statute limiting the jurisdiction of justices (Sess. Acts 1868, p. 59, § 1) has no application to garnishment proceedings. Under sections 27–40, Gen. Stat. 1865, the garnishee is authorized, without any resort to the justice at all, to deliver property or pay money sufficient to satisfy the execution, without regard to its amount; and the justice's jurisdiction as to the amount of his judgment is co-extensive with the authority given to the garnishee to pay over to the constable. In such case the justice may render judgment against the garnishee without waiting for the return day of the writ.
2. *Execution—Justice's court—Garnishee entitled to injunction against plaintiff in execution, when.*—A garnishee in execution, before a justice, is not entitled to an injunction against the plaintiff simply on the ground that the amount seized exceeded the jurisdiction of the justice, or that judgment was entered against him before the return day of the writ. To entitle him to this remedy he must make a showing that it would be against conscience to execute the judgment complained of; that he has not been remiss in his own duties, and that he has been deprived of his right by some fraud or accident.



*Appeal from St. Louis Circuit Court.*

*Grace*, for appellant.

The justice had no jurisdiction over the subject-matter of the action. (Gen. Stat. 1865, ch. 177, §§ 2, 3; Sess. Acts 1868, p. 59, §§ 1, 2; Gen. Stat. 1865, ch. 142, § 37; *Doggett v. St. Louis Marine and Fire Ins. Co.*, 19 Mo. 201.) The judgment of the justice against the garnishee was void because it was rendered before the return day of the execution. (*Sanders v. Rains*, 10 Mo. 770; *Williams v. Bower*, 26 Mo. 601.)

*Staples*, for respondents.

I. No appeal lies where a temporary injunction has been granted and dismissed upon answer and motion, unless a final judgment is of record. (32 Mo. 428, 578; 7 Mo. 348; 33 Mo. 117, 376; 34 Mo. 204; *Miller v. State*, 8 Ind. 325, 377, 416; 9 Ind. 238; 12 Ind. 477.) To authorize the granting of an injunction against a judgment at law, the bill must show it to be against conscience to execute such judgment, and that he could not avail himself of this defense at law by reason of fraud, etc. (2 Sto. Eq. Jur., § 887; 7 Cranch, 332; 10 Mo. 100; 36 Mo. 141; 18 Verm. 45; 1 Turn. & Russ. 319; 4 How. 142; 13 Verm. 477.) By provisions of Gen. Stat. 1865, ch. 142, § 35, the garnishee may discharge himself. (*Wimer v. Pritchett*, 16 Mo. 25.) The justice only renders judgment against the garnishee for the amount of the note, interest, and costs, the subject-matter of which he has already exercised jurisdiction. (*Doggett v. Marine and Fire Ins. Co.*, 19 Mo. 201.) There is no equity in the bill.

II. By waiving exceptions to the jurisdiction of the justice in the justice's court, the party is entirely deprived of that cause of objection. Where the garnishee voluntarily comes into court and confesses that he owes the defendant in execution, he can not complain of his own action.

CURRIER, Judge, delivered the opinion of the court.

The plaintiff seeks to enjoin the enforcement of judgment rendered against him by a justice of the peace, on the ground of defect of jurisdiction in the justice, and because of supposed irregularities in the proceedings. It appears that the defendant, Staples, sued Charles and August Bollman before a justice, on a note of \$282, on which some ninety dollars of interest had accumulated. Staples obtained a judgment for \$473.70 debt, which, with the costs, amounted to near \$500. Execution was issued, and Davis, the present plaintiff, was summoned thereon as garnishee of the Bollmans. Without waiting for the return day of the execution, Davis voluntarily appeared before the magistrate and disclosed in writing, in answer to the usual interrogatories, that he was indebted to one of the Bollmans in the sum of \$500. This was on the 28th day of September, 1868. On the 30th day of the same month, and before the return day of the execution, the magistrate rendered judgment against Davis, on his answer, for the sum of \$500. The execution issued upon this judgment the plaintiff now seeks to enjoin, and to vacate the judgment upon which it was issued. These are the material facts on which the case depends.

1. The statute fixes the jurisdiction of justices of the peace, in actions founded on contract, at \$200, exclusive of interest. The plaintiff's counsel argue from this fact that the jurisdiction of justices in garnishment cases must be limited to the same sum. It is conceived, however, that the statute referred to (Sess. Acts 1868, p. 59, § 1) has no application to garnishment proceedings. The jurisdiction, powers, and duties of justices of the peace, in this latter class of cases, are defined and regulated by the statute devoted to that particular subject. (Gen. Stat. 1865, §§ 27-42.) It is there provided (section 35) that the garnishee may discharge himself by paying over the money, or surrendering the property in his hands to the constable, to an amount "*sufficient to satisfy the debt and interest, or damages, and costs.*" It is thus seen that the garnishee is authorized, without any resort to the justice at all, to deliver property or pay money sufficient to satisfy the execution, without regard to its amount. But if the

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garnishee neglects to do this, and answers in court, then the justice is authorized (section 37) to "render a judgment against him for the proper amount in money," the amount being alone limited to that which is "proper" to the case, namely: first, to the amount in the garnishee's hands; and, second, to the amount of the judgment and costs—that is, to the judgment against the execution debtor; and no final judgment can be rendered against a garnishee until a judgment has first been had against the principal debtor. (Section 38.) The justice's jurisdiction, as regards the amount of his judgment in garnishment cases, is co-extensive with the authority given to the garnishee to pay over to the constable without a judgment. If it were otherwise, the refusal of the garnishee to pay to the constable would prejudice the creditor to an amount equal to the excess of his judgment and costs, over the amount for which the justice could take jurisdiction in an ordinary action—in this instance, to the amount of \$300. The Legislature intended no such result. (See *Doggett v. St. Louis Ins. Co.*, 19 Mo. 201.)

2. It is further insisted, however, that the judgment against the garnishee was prematurely rendered—that is, that it was rendered before the return day of the execution. It is urged that the justice should have delayed the entry of judgment on the answer till that time. The garnishment statute makes no such provision. It simply provides that where the garnishee fails to make payment, etc., to the constable, the magistrate shall render judgment for the proper amount in money, the answer being uncontradicted. The garnishee is not the proper party to complain of his own answer; and the other parties made no objection.

But this is not a case which requires us to go into and settle nice questions of practice. In order to entitle the plaintiff to the remedy by injunction, he must make a case showing that it would be against conscience to execute the judgment complained of; that he has not been remiss in his own duties, and that he has been deprived of his rights by some fraud or accident. (2 *Sto. Eq. Jur.*, § 887; 36 Mo. 141.)

He does not bring himself within this rule, and the judgment must be affirmed. The other judges concur.

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Kellogg v. Mullen.

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SANFORD B. KELLOGG, Respondent, v. JAMES MULLEN,  
Appellant.

1. *Lands and land titles — Boundaries fixed — Monuments must prevail over linear measurements.*—A., being owner of 120 feet on Third street, in the city of St. Louis, deeded to B. 60 feet thereof, described as adjoining on the north his grantors. B. afterward conveyed to C. the northern 30 feet of this property, and the remainder to D., being 30 feet to each. In a controversy between C. and D. as to location, *held*, that were there any monuments fixing the southern boundary of A.'s original land, they must prevail over the linear measurements. Otherwise D. must yield to C., and, unless barred by adverse possession, will be entitled to recover a similar tract from his southern neighbor.

*Appeal from St. Louis Circuit Court.*

S. B. Kellogg, for respondent.

Bakewell & Farish, for appellant.

BLISS, Judge, delivered the opinion of the court.

This is the same action that is reported in 39 Mo. 174. After the case was remanded the plea of the statute of limitations was abandoned, and a trial was had upon the question of location merely. All the property whose location is involved lies in the northwest part of block 53, and fronts on Third street. The common source of title is Alexander Bellissime, who owned 120 feet (French) on Third street by 150 on Poplar. Defendant, in his argument, asserts that Bellissime's south line is the center of the block; but I find nothing in the record to warrant the assertion. His title deeds indicate nothing in that respect, and there is nothing to show how far the block extended south of him, or who were its owners, except that the name is given upon whom he is bounded. By two deeds, one in 1811 and one in 1812, he extends south 120 feet (French); and we are not advised as to the size of the block, or whether there was any such division as a block, or whether there was any other cross street near him except the one bounding him on the north. We must assume, then, that he owned, fronting on Third street, the number of feet mentioned in his deeds, and this fact becomes material.

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Bellisime and wife, on the 6th of April, 1816, conveyed to Henri Baltut 60 feet (French) front on Third street by 150 deep, giving his boundaries, and "adjoining on the north his grantors." This conveyance gives Baltut the south half of what Bellisime thus owned, and, by a marriage contract, it afterward became the property of his wife, Pelagie, who was afterward twice married, and became Pelagie Boyer and Pelagie Charleville. Thus Bellisime's lot became divided into two equal parcels; and before said Pelagie made any conveyances, he had sold the north half, which, by various transfers, became, on the 29th of June, 1831, the property of Hilaire Semont, or Semons, or Cimmons, as he is variously called in other deeds. The description of the land in all the deeds is substantially the same, and is 60 feet (French) front by 150 deep, and is bounded north by the cross street (Poplar).

Coming back to the south half, first conveyed to Baltut, I find that Pelagie Boyer, on the 27th of November, 1847, as part of the land so received of Bellisime, conveyed to Thomas J. White 32 feet fronting on Third street by 160 deep, bounded north by a lot of Cimmons; and by three other successive conveyances the same land, on the 8th of February, 1854, comes into plaintiff's hands. In each instrument, Cimmons or Semons is called for on the north; and the front is 32 feet, which is equal to 30 feet French. Other calls show that she intended to convey next to Semont.

On the 10th of January, 1851, Pelagie Laforce (Boyer) conveys to O'Flaherty 60 feet (French) front by 150 deep, which covers all that had been conveyed through White and others to plaintiff, with what she had left. Of course the deed only operates upon what remained in her hands after her deed to White, and can in no way affect plaintiff's title. The dispute is between Kellogg and the tenant of O'Flaherty; the former claiming his full 30 feet French, south of Semons, which claim cuts off over four feet from defendant's possession; and the latter, who has his full 32 feet English (30 feet French), insisting that plaintiff must make up his complement out of Semont.

Had there been evidence to show that the south line of Belli-

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sime, before his conveyance to Baltut, was the center of the block, which is less than 120 feet (French) from the north line, then Semont, as his last grantee, must lose, and the plaintiff and defendant, who hold under Baltut, will each take their full 30 feet French. This the defendant's landlord has now, and the plaintiff would be required to move north, instead of south, for his complement. It would make no difference if Semont had acquired title by limitation, as he should have moved before. But, as we have before seen, the record fails to show any monuments locating, or from which to locate, Bellissime's south line. Hence we must assume that it was as far south as his deeds make it, and far enough to include the usual calls for front feet in his conveyances to Baltut, and to Bouvet, through whom Semont holds; in which case the plaintiff must take from O'Flaherty the strip in dispute, which is necessary to give him his 30 feet French; and O'Flaherty, if he has not lost it by adverse possession, must take a similar strip from his southern neighbor. This view was taken by the court below, and the defendant's declarations of law, based upon his theory of the case, were properly refused.

The judgment will be therefore affirmed. The other judges concur.

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JOHN W. MCWILLIAMS *et al.*, Plaintiffs in Error, v. DAVID ALLAN,  
Defendant in Error.

1. *Mechanics' lien*—Statement of the balance due the plaintiff, without detailed statement of credits, etc., insufficient. —The term "account," as used in the mechanics' lien law, means a detailed statement of mutual demands in the matter of debit and credit, arising out of a contract, or some fiduciary relation between parties; and a statement filed in a mechanics' lien suit which does not show even the aggregate of the different items, or the aggregate of the credits on account of the work, but simply sets down, in a round sum, what the plaintiffs claim as the balance due them, is insufficient.

*Error to St. Louis Circuit Court.*

*S. M. Breckinridge and J. H. Clark*, for plaintiffs in error.

*Lackland, Martin & Lackland*, for defendant in error.



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CURRIER, Judge, delivered the opinion of the court.

The plaintiffs filed with the clerk of the Circuit Court of St. Louis county their papers for a mechanics' lien, therein stating their claim thus :

"DAVID ALLAN, Jr., to McWILLIAMS & HARDY, Dr.

"To balance due on account of building two-story cottage of brick, on lot of ground fronting on Jones street and Cook avenue, in the city of St. Louis, and on erecting fence around said lot, \$503."

This suit is brought to enforce the lien thus sought to be created. At the trial, the plaintiffs offered in evidence the lien papers, to which the defendant objected on the ground that they failed to show that the plaintiffs filed therewith a "just and true account of the demand due them, after all just credits had been given," as the law requires. (Gen. Stat. 1865, p. 766-95.) The plaintiffs, as the papers show, filed a claim for a balance merely, without stating the antecedent elements of the demand which produced the supposed result. Is that sufficient? Is it such an "account" as the Legislature intended to secure? That is the question which the case presents for decision.

There is a broad distinction between an account and the mere balance of an account—resembling the distinction in logic between the premises of an argument and the conclusions drawn therefrom. A balance is but the conclusion or result of the debit and credit sides of an account. It implies mutual dealings, and the existence of debt and credit, without which there could be no balance. What the Legislature evidently intended was that the lienor should exhibit his demand fully, giving debt and credit where the two elements existed in the lien claim, and thereby show the balance sought to be imposed as a lien. In other words, it was intended that the lienor should file an account, and not the mere result, balance, or conclusion of an account.

An account is defined to be a detailed statement of mutual demands in the matter of debt and credit between parties, arising out of contract, or some fiduciary relation. (Whitewell, 2; Willard, 1; Metc. 216; Bouv. L. D. The definition is an

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accurate one, and expresses the sense in which the term is used in the mechanics' lien law, and also the sense in which the word is current in business affairs.

It appears from the record that the plaintiffs erected a house for the defendant, under a written contract; that the contract price of the erection was \$5,448; and that a fence was built on the premises as an extra job, or job not included in the contract. The claim filed as the foundation of the lien, however, does not show even the aggregate of either of these items, or the aggregate of credits on account of the work, but simply sets down, in a round sum, what the plaintiffs claim as the balance due them. If that is sufficient in this case, it must be held sufficient in all cases, producing a result most manifestly not anticipated by the Legislature.

When it is proposed to embarrass real estate with the encumbrance of a lien, it is no hardship to require of the lienors a statement of their demand, sufficiently precise and full to acquaint the owners and all interested parties with its nature and extent, with a specification of debt and credit. This was clearly the intent of the law giving the lien; and the provision is wholesome, and must be respected and carried out.

With the concurrence of the other judges, the judgment will be affirmed.

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THE STATE OF MISSOURI, Respondent, *v.* THOMAS RICHESON  
and CHARLES K. VICKERS, Appellants.

1. *Criminal law—Dealing as merchant—Definition of merchant.*—One who manufactures and supplies goods to the previous orders of his customers alone, although he keeps on hand, but not for sale, the materials from which the manufactured articles are produced, is not a merchant within the meaning of the statute (Wagn. Stat. 937, § 1). (State v. West, 34 Mo. 424.)
2. *Criminal law—Information for dealing as merchant without license—What dealings constitute a merchant—Burden of proof on defendant, to show what.* In an action by the State against one engaged in the manufacture of white lead, for exercising the trade and business of a "merchant without license," the State would make out a *prima facie* case by showing that defendant, after receiving orders from his customers, filled them the same and succeeding.

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days. The natural inference would be that he kept the articles on hand; and to rebut this inference it was not sufficient to show that he *might* have manufactured the lead after the orders were received, but he should have shown that he did so manufacture it.

*Appeal from St. Louis Court of Criminal Correction.*

*Cline, Jamison & Day*, for appellants.

I. "To be a merchant, in the sense of the law, the dealer must have on hand goods, wares, and merchandise ready for sale and present delivery, and must also actually deal in the selling of the same." (The State v. Whittaker, 33 Mo. 457; The State v. West, 34 Mo. 424; R. C. 1855, p. 409, §§ 1, 2.)

II. The presumption of innocence runs in favor of the accused, and remains until overcome by competent proof; and there is no evidence in this case that the Collier White Lead Company ever delivered any white lead on an order that could not be manufactured for the customer after the order had been given, and before the lead was delivered.

*H. B. Johnson*, Attorney-General, with *Colcord & Farney*, for respondent, cited R. C. 1865, ch. 93, § 1; State v. Whittaker, 33 Mo. 457; State v. West, 34 Mo. 427; 37 Mo. 192; State v. Jacobs, 38 Mo. 379; State v. Cox, 32 Mo. 566; 27 Mo. 344, 464; 26 Mo. 171; State v. Brown *et al.*, 8 Mo. 210; State v. Hunter, 5 Mo. 360; State v. Martin, *id.* 361; Tracy *et al.* v. State, 3 Mo. 3; 43 Mo. 179; 2 Bouv. Law Dic.; Gen. Stat. 1865, p. 409, § 3.

BLISS, Judge, delivered the opinion of the court.

Defendants were prosecuted by information for exercising the trade and business of merchants without license; and it was shown that they were officers and agents of the Collier White Lead and Oil Company, a St. Louis corporation engaged in the manufacture of white lead. The evidence failed to show that the manufactured article was kept on hand and exposed for sale by the company, but it did show that its agents were in the habit of receiving orders at the manufactory from wholesale dealers,

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entering them upon the order-book, and subsequently delivering the lead. The witnesses gave different periods of time between the orders and the delivery; but one testified that he was in the habit of giving his orders in the morning, and received the lead the same or the next day. To rebut this testimony, the defendants showed that it took some ninety days to carbonize the virgin pig-lead, and some twenty-four hours to dry and pulverize it; that the factory kept on hand, at all times, a million pounds of carbonized lead, and the necessary cooperage; and that an order for a ton of white lead could be filled in two hours, as it was made by grinding the carbonized lead with tiff and oil.

The court, at the instance of the defendants, held as declarations of law that if the company for whom they acted, or if the defendants themselves, were engaged in manufacturing white lead upon written or verbal orders, and "did not at any time keep on hand for sale, or offer or expose for sale, or sell, any white lead that was manufactured and complete or ready for delivery at the time the same was ordered," then defendants were not merchants, and it did not matter if the company had on hand large amounts of carbonized lead, tiff, and oil, out of which to manufacture the white lead to fill the orders. The substance of this position was held by the court in three declarations of law, but the court refused to make the following: "Before the State can convict in this case, it must establish beyond a reasonable doubt that the defendants exercised the business of merchants in the city and county of St. Louis; that is to say, they must be shown to have kept on hand ready-manufactured white lead for sale, or to have sold the same, ready-made, at their factory or place of business; and that the burden of establishing these facts is upon the State; and they can not be inferred from the mere fact that orders were left at the factory for white lead, which were subsequently filled." To this refusal the defendants excepted, and the court finding them guilty, they appeal.

The statute (Wagn. Stat. 937, § 1) defines a merchant as follows: "Every person, or co-partnership of persons, who shall deal in the selling of goods, wares, or merchandise, including clocks, at any store, stand, or place occupied for that purpose, is

declared to be a merchant." So that it does not matter whether a person buys and sells, as merchants ordinarily do, or manufactures and sells; if he "shall deal in the selling" at any particular place, he is a merchant. (See *State v. Whittaker*, 33 Mo. 457.) But this court decided in *State v. West*, 34 Mo. 424, that a tailor who kept cloth on hand from which to make clothing, and only made it up for the personal use of his customers, and not for sale, was not a merchant under this statute.

In the case at bar, the court conceded everything to defendants so far as the interpretation of the statute is concerned, and must have adopted not only the principle of the case of *State v. West*, but also to the full extent the opinion of Judge Dryden, who declares that "to be a merchant in the sense of the law, the dealer must have on hand goods, wares, and merchandise ready for sale and present delivery, and must actually deal in the selling of the same. One who manufactures and supplies goods alone to the previous order of his customers, although he keeps on hand, but not for sale, the materials from which the manufactured articles are produced, is not a merchant within the meaning of the statute." It may be said that there is no difference in principle between filling orders with the manufactured lead kept on hand for that purpose, and mixing and grinding out the manufactured materials after the orders come in. Perhaps not, but the defendants received the benefit of this distinction, and they can not complain of it.

The only question, then, raised by the record pertains to the evidence. To make the declarations of law consistent with the finding, the court must have held that the State made a *prima facie* case; that it was sufficient to show that the defendants, after receiving orders from their customers, filled them the same and succeeding days; that the natural inference would be that they kept the article on hand. And to rebut this inference it was not sufficient to show that they *might* have manufactured the lead after the orders were received, but they should have shown that they did so manufacture it.

The State must always make out a case. The accused must be presumed innocent until the facts necessary to establish guilt

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are shown beyond a reasonable doubt. But the evidence which should be held sufficient to show these facts must depend upon the circumstances of each case. The State is not required to perform impossibilities. It is often prevented by the nature of the transaction, or by circumstances surrounding it, from proving directly the offense charged, in which case it is sufficient to establish facts that imply guilt, and the defendant is required to explain them. For instance, in a charge of larceny, if the stolen goods are found upon the prisoner he may have come honestly by them, but the presumption against him, or the reasonable inference from the fact, is so strong that he is properly required to show how he obtained them. The State can not show it, he can. And in the case at bar, I know not how the State could have done more than it did. The goods of defendants are not publicly exposed for sale, nor is it necessary that they should be in order to constitute them merchants. If they are sold by sample, or from knowledge of their character, they may well be kept in the private warehouse until orders are received. The purchaser does not know, outsiders do not know, no one knows but the defendants and their employees, whether each order is filled by grinding out the amount, or whether the article is kept on hand ready for delivery, or whether some orders are filled in one way and some in the other. It was in defendants' power to explain the matter, and a sufficient presumption was raised to require them to do it. But they contented themselves with showing the immaterial fact that after receiving the orders there was time enough before filling them to manufacture the lead. We have nothing to say upon the suggestions of defendants' counsel as to the impolicy of taxing manufacturers as merchants. We can only be asked to give the law a fair construction, and the language of the court above quoted in *The State v. West*, adopted by the judge who tried this case, goes to the very verge of a reasonable interpretation in favor of the manufacturer.

The other judges concurring, the judgment will be affirmed.



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Reed et al. v. Robertson et al.

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WELLINGTON REED and WIFE, Defendants in Error, v. FREDERICK  
ROBERTSON *et al.*, Plaintiffs in Error.

1. *Equity—Proceedings in partition.*—A proceeding in chancery may be had for the partition of an equitable estate. (Welch v. Anderson, 28 Mo. 293; Reinhardt v. Wendek, 40 Mo. 577.)
2. *Practice, civil—Supreme Court—Objection made for first time comes too late.*—An objection to the sufficiency of a petition, made in the Supreme Court for the first time, comes too late.
3. *Equity—Partition of equitable estate—What averments sufficient.*—In a suit for the partition of equitable interests in real property, an averment of the petition that each party held an undivided half of the equitable estate, is sufficient, without any allegation that they held jointly or as tenants in common.
4. *Equity—Legal estate and possession in defendant as trustee of plaintiff—Ejectment, improper—Suit should be brought in equity.*—When the legal title and the right of possession of a portion of certain land were in defendant, as the trustee of plaintiff, and nothing showed any actual ouster or disseizin by defendant, plaintiff could not sue in ejectment, but should resort to a suit in equity for partition, subject to the terms of the deed of trust.

*Appeal from St. Louis Circuit Court.*

*Gantt*, for plaintiffs in error.

I. No case is made for partition. This was an adversary proceeding in which the title was in question, and in order to determine the question of title the court tried a suit in chancery, not, however, between the parties concerned, but with a palpable defect of parties.

II. The eldest daughter of Mrs. Elizabeth Robertson was a necessary party; this was disclosed by the answer and by all the evidence.

III. The court admitted evidence that was wholly incompetent. The letter of Robertson, and the re-examination of Mrs. Reed and the examination of Mr. Reed, were all directed to the contradiction of Robertson on a collateral matter.

IV. If this be considered a proceeding in partition, there is no allegation that the parties hold the land together, in common or jointly; only that the plaintiff is "entitled to half the premises." This may be, and yet no case be made for a decree of partition. A person rightfully claiming an interest in land held

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and claimed by others must obtain seizin and possession before he can ask for partition. (*Lambert v. Blumenthal*, 26 Mo. 47; *Forder v. Davis*, 38 Mo. 107; *Shaw v. Gregoire*, 41 Mo. 407.)

*Whittlesey*, for defendants in error.

There was no evidence of any actual disseizin or ouster by the defendant of the plaintiff. The legal title was in Farley, trustee; and the possession was in him, as a matter of law. He held it for the several benefits of the parties, and the tenants were his tenants. The plaintiff could not sue in ejectment, for she had not the legal title nor the right to the possession. She had, therefore, simply her equitable remedy for a partition, subject to the terms of the trust.

CURRIER, Judge, delivered the opinion of the court.

The plaintiffs filed their petition in the nature of a bill in equity for the partition of an equitable estate in certain premises therein described. It is alleged in the petition that the defendant, Frederick Robertson, on the 14th day of December, 1855, conveyed said premises to the defendant, Ed. B. Farley, for the sole and exclusive use of the plaintiff, Mrs. Isabella Reed, then Isabella Robertson, and of the defendant, Mrs. Elizabeth Robertson, the wife of the grantor in the deed; the said Isabella being his daughter by a former wife. It is also alleged that Mrs. Reed was, at the time the deed was made, a minor; that she has since come of age and intermarried with Wellington Reed, her present husband, who is joined in the action; that she is entitled to an equitable estate in said premises of one undivided half, and that Mrs. Robertson is entitled to the other half, the defendant, Farley, holding the legal title.

Farley answered, admitting the trust, but disclaiming any interest in the property, and asked to be protected against costs. The other defendants answered, admitting the execution of the deed conveying the property to Farley in trust, but denied that Mrs. Reed was a party thereto; and allege that the "Isabella" mentioned therein as the child of Robertson, the grantor, is a "totally different person from the Isabella Reed mentioned in the

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plaintiff's petition." It is alleged further that the Isabella mentioned in the deed as one of the beneficiaries therein is the daughter of the defendant, Robertson, by his present wife, one of the defendants in this suit. It is denied that Mrs. Reed holds the premises sought to be divided, in common with any of the defendants. The plaintiffs replied, putting in issue the new matter set up in the answer. Judgment of partition was rendered in the court below, in accordance with the prayer of the petition, from which the defendants appealed to general term, and thence bring the cause here by writ of error.

The pleadings make but one issue of fact, namely: whether the plaintiff, Mrs. Reed, was named as one of the beneficiaries in Robertson's trust deed to Farley. The beneficiaries were therein described thus: "Elizabeth Robertson, my wife, and my child, Isabella." Mrs. Reed was then about eleven years of age, and was known and called by the name of Belle, or Isabella. At the same time she had a half-sister—her father's daughter by the present Mrs. Robertson—who was also called Isabella, as the testimony intimates, her full name being Isabella Chloe Elizabeth Robertson. Hence the supposed uncertainty as to the child mentioned in the deed of trust. At the time the deed was executed, the second Isabella was an infant of less than two years of age. Robertson, of course, knew which child he intended to make the recipient of this particular bounty. There is no accounting for his subsequent conduct as connected with this matter, except upon the theory that the deed was made for the benefit of his then wife and his daughter, the present Mrs. Reed. The court below found that she was intended as one of the beneficiaries, and we have no disposition to disturb that finding. We have carefully examined all the testimony, and are satisfied with the result; but we do not feel called upon to go into any detailed analysis and sifting of the evidence in order to sustain our view of its effect.

It is claimed, however, that the court admitted incompetent proofs; that a letter of Robertson's was read in evidence improperly; and that Mrs. Reed was improperly re-examined for the purpose of contradicting some of the former's statements. A

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proper foundation had been laid for the impeachment of this witness, and we see no objection to the evidence employed for that purpose. His attention had been called to time and place, and it was competent to show that he had made statements out of court in conflict with his testimony on the stand. But it is said that this was an adversary proceeding, wherein the title to real estate was drawn in question; that the court, in order to determine a question of title, tried a suit in chancery. Assume the fact to be so, what of it? This is a chancery proceeding for the partition of an equitable estate. The statute authorizes it. (Wagn. Stat. 966, § 1; Welch v. Anderson, 28 Mo. 299-300, 462; 40 Mo. 577.) The court determined who was the beneficiary named in the trust deed, and did not otherwise determine any question of title. Apart from that, there was no issue or dispute.

Again, it is urged that the pleadings and evidence show a defect of parties; that Isabella Chloe Elizabeth Robertson ought to have been joined in the defense. It is true that she is alleged in the answer to have been the beneficiary named in the deed of trust; but that allegation is negatived by the proof and the finding of the court. The unsustained and disproved averments of an answer can not create a defect of parties. The answer alleged a good defense, but it broke down.

The defendants, moreover, make the point that the petition contains no averment that the parties to the suit held the land jointly, or as tenants in common. No objection was taken to the sufficiency of the petition in the court below, and the objection taken here for the first time comes too late. But it is without force. This is not a proceeding for the division of a legal estate. It is a suit for the partition of equitable interests in real property, and the averments of the petition are addressed to the equities of the case. The averment that each held an undivided half of the equitable estate is sufficient. The legal title and right of possession were in Farley, the trustee, and for that reason Mrs. Reed could not sue in ejectment. She therefore resorted to her suit in equity for a partition, subject to the terms of the deed of trust. It is not averred in the answer, nor

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is it shown by the proofs, that there has been in fact any actual ouster or disseizin by the defendants. *Lambert v. Blumenthal*, 26 Mo. 471, and the cases which follow that decision, have therefore no application.

The judgment will be affirmed. The other judges concur.

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C. J. CARPENTER *et al.*, Appellants, *v.* C. S. RANNELLS *et al.*,  
Respondents.

1. *Land claim under Spanish permission of settlement conveys only the equitable title, but equitable title sufficient for the confirmation.*—A claimant of land under a Spanish permission of settlement has merely an equitable title. The legal title would not pass to the heir till the claim was confirmed by the United States; but the equitable title, for the purposes of confirmation, would be sufficient. The confirmation would inure equally to the claimant, be his title legal or equitable.
2. *Lands and land titles—Claims before board of land commissioners by B., as assignee of A.—Confirmation to A. or his legal representatives—Effect of on claim of B.*—Where the records of the proceedings before the board of United States land commissioners for the adjustment of claims, in 1811, showed that B., as assignee of A., claimed certain land, under the act of Congress of March 2, 1805 (U. S. Stat. 324), and produced to the board evidence of his derivative title, the legal effect of a judgment of the board confirming the land "to A. or his legal representatives" was to confirm the title to B., although his name was omitted in the form of the confirmation.
3. *Recorder of land titles, headings of—Records of U. S. land commissioner superior to.*—The titles for headings prefixed by the recorder of land titles to his records of papers in a case must yield if they come in conflict with the records of the United States land commissioners. Such title or heading of papers, recorded by the recorder, neither fixed their character nor determined the fact as to who the claimant was.

*Appeal from St. Louis Circuit Court.*

*Hill & Jewett*, for appellants.

I. The court below erred in holding the confirmation to be to James Bankson, assignee of John Butler. John Butler was the original claimant in 1806; James Bankson was a second claimant in 1811. The first and second claims, if ever made, were directly in conflict, and the board granted the land to John Butler and his legal representatives. It was a direct confirmation

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to Butler as the original claimant. (Strother v. Lucas, 12 Pet. 453 ; Bissell v. Penrose, 8 How. 338 ; Landes v. Brant, 10 How. 370 ; Hogan v. Page, 2 Wall. 606.)

II. In this case there was an original claimant and an adversary claimant before the same board, if the heading of the minutes of the proceedings is correct, and the adversary claimant asserted that he was assignee of the original claimant by force of the lease and agreement for a sale on condition, not proved before the board to have been performed. The board passed upon these two claims, and confirmed the original claim, and granted the land to John Butler or his legal representatives. It was gross error to say that this confirmation was to the assignee claiming in April, 1811, when his claim was rejected by the confirmation of the claim of the original claimant in express terms. In Hogan v. Page, the Supreme Court of the United States held that where there is only one claimant, "Lamonde, assignee of Aug. Conde, and the board granted to the representatives of Conde forty arpents," the question as to whom the title should inure to was one for inquiry in the courts, upon the facts proved. The Supreme Court of Missouri, in the same case, held that the confirmation operated as a grant to Conde and his legal representatives. The Supreme Court of the United States modified the State court decision by giving Lemonde the privilege of proving up his title as assignee, although he was the sole claimant before the board. In the case at bar, the original claimant and grantee, and possibly the second claimant, pretending to be assignee, were both before the board claiming the same land; and the board confirms and grants the land to John Butler and his legal representatives, to the exclusion of Bankson.

*Glover & Shepley*, for respondents.

I. The confirmation in this case was to James Bankson, the claimant before the board. The board itself has determined that matter by the entry of their first action on the claim. The filing of the deed of Butler to Bankson shows that Bankson was the claimant before the board. (Bissell v. Penrose, 8 How. 337-8.) The transfer of Butler to Bankson was efficient to transfer to



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Bankson the complete, equitable, and indeed legal, title to the land. The equitable title to land in the claimant is just as efficient as a complete legal title to obtain a confirmation, and inures equally to plaintiff, whether his claim be an equitable or legal one. (*Papin v. Massey*, 27 Mo. 445.) But even if it was questionable what was the situation of the claimant without his showing a compliance, he did show such compliance before the board by showing a constant cultivation of the land. John Butler was never a claimant before the board, and therefore could have no claim conferred to him. (*Magwire v. Tyler*, 40 Mo. 406.) The claimant Bankson was the person to whom the land was confirmed. (*Bissell v. Penrose*, 8 How. 338; *Boone v. Moore*, 14 Mo. 420; *Hogan v. Page*, 2 Wall. 605; 22 Mo. 55; *Connoyer v. Washington University*, 36 Mo. 480; *Easton v. Salisbury*, 21 How. 426.)

II. The equitable owner of the New Madrid land, at the issuing of the New Madrid certificate, is the person to whom it belongs. The title to land under a New Madrid certificate is to be determined in an action of ejectment, according to the equitable rights of the parties. (Sess. Acts 1838-9, §§ 2, 3; R. C. 1845, p. 442, §§ 11, 12; *Mitchell v. Tucker*, 10 Mo. 260.) The title to the newly-located land belongs only to the person owning the land in lieu of which the newly-located land was located. (*Wear et al. v. Bryant*, 5 Mo. 147; *Kirk v. Green*, 10 Mo. 252; *Page v. Hill*, 11 Mo. 149.)

CURRIER, Judge, delivered the opinion of the court

This is an ejectment suit for two hundred arpents of land in township 45, St. Louis county, located under New Madrid certificate of re-location No. 511. This certificate was issued under the act of Congress of February 17, 1815, and supplementary acts, in lieu of lands in New Madrid county which had been injured by earthquakes. The plaintiffs seek to deduce title to the premises in suit through John Butler, who acquired an interest in the New Madrid lands in virtue of a Spanish permission of settlement granted April 16, 1801. This inception of title is conceded. The defendants, however, contend that Butler, July

23, 1801, by a conditional sale, conveyed his inchoate title to James Bankson; and that Bankson, under the act of Congress of March 2, 1805, filed his claim to the lands with the United States land commissioners, as also his evidence of derivative title, and procured confirmation of the same to himself. The plaintiffs admit the conditional sale, but insist that there is no evidence that the stipulated conditions were complied with, and claim that Butler, in fact, made the claim which was filed with the land commissioners, and secured a confirmation for his own benefit. The effect to be given to the proceedings of the land commissioners determines the disposition to be made of the case; for if Butler was the claimant before the land commissioners, and the confirmation was to him, it is not questioned that the plaintiffs have his title. On the other hand, if Bankson was the claimant, and furnished the evidence of his derivative equitable title, and the confirmation inured to him, and not to Butler, then the plaintiffs have no title. At the trial the court declared, as matter of law, that the "legal effect of the proceedings before the board of commissioners for the adjustment of land titles in 1811, read in evidence by the plaintiffs, is to confirm the land therein mentioned to James Bankson, assignee of John Butler, the assignment by Butler to Bankson having been filed as part of the claim of said Bankson."

This instruction assumes that Bankson was the claimant before the board. Does the record of the proceedings of the board show this fact? The following entries appear:

*"Claim, Statement, and Notice.*—John Butler claims 200 arpents of land situated in the district of New Madrid, under second section of the act of Congress."

Then follows the record of an order and certificate of survey, the survey being dated February 6, 1806. Then follows Butler's contract of sale to Bankson. The first action which the board appears to have taken on the subject was in April 12, 1811. The record is as follows:

*"Friday, April 12, 1811.*

"Board met. Present: John B. C. Lucas, Charles B. Penrose, and Frederick Bates, commissioners.

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"James Bankson, assignee of John Butler, claiming 200 arpents of land situated on Cypress Swamp, district of New Madrid, produces to the board an order of survey dated April 16, 1801, a certified copy of a conditional transfer from Butler to claimant, dated July 23, 1801, a plat of survey dated February 2, 1806.

"The board grant to John Butler, or his legal representatives, 200 arpents of land, and order that the same be surveyed as nearly in a square as may be so, and to include his improvements.

"Board adjourned till Monday next, 9 o'clock A. M."

The record is then signed by the commissioners.

The record then shows an entry under date of June 20, 1811, thus: "Board met. Present, full board. Certificate No. 1103. John Butler's legal representatives, book 5, p. 148. Survey at expense of the United States." Certificate No. 1103 recites that the board had "decided that the legal representatives of John Butler" were entitled to a patent. The certificate is dated June 20, 1811. It is thus seen that the record shows with distinctness that James Bankson, as assignee of John Butler, claimed the land, and "produced" to the board the evidence upon which a confirmation was granted. The memorandum, "John Butler claims," etc., is evidently an error. When the commissioners took up the claim and acted upon it, they only recognize Butler as the assignor of Bankson. Bankson is recognized as the real claimant, and as the party who in due time and way furnished the evidence on which the action of the board was founded. The conditional transfer from Butler to Bankson was a prominent feature in the evidence, and shows that Bankson was the claimant before the board, and that he was claiming under the conditional conveyance. The transfer furnished a link in his chain of title, and was therefore important to him. Butler's claim rested upon the original permission of settlement and survey. That was his evidence of title. The only effect of the transfer was to show that he had parted with his interest, and that Bankson was the true equitable owner.

Neither Butler nor Bankson had a legal title. The claim originated in a permission of settlement. The legal title did not

pass till the claim was confirmed by the United States. The confirmation, therefore, was of an equitable title. But the equitable title, for the purpose of the confirmation, was sufficient. The confirmation inured equally to the claimant, whether the title was legal or equitable, as was settled in *Papin v. Massey*, 27 Mo. 455.

The contract of sale, given in evidence by the plaintiff, shows that the entire purchase money was paid by Bankson, and that nothing remained for him to do but the performance of the stipulated settlement duties, which were of benefit to him, and of no advantage to Butler, the seller. The performance of these duties constituted no part of the consideration of the sale. They were conditions to be performed in order to the acquisition of a perfect legal title from the Spanish government. These conditions were to be performed in three years from July 23, 1801, the date of the contract. The land commissioners' records show that evidence was produced before them proving that the "premises were improved, inhabited, and cultivated in 1802, and continuously till 1805," and they must have found the fact to have been so.

Assuming, then, that the records show that Bankson was the legal claimant before the commissioners, and that he produced to the board the evidences of his title on which the claim was founded, what was the legal effect of the judgment of confirmation? Was the title thereby confirmed in Bankson? That is the question that controls the case. According to the rule laid down in *Bissell v. Penrose*, 7 How. 338, followed in *Boon v. Moore*, 14 Mo. 420, and frequently referred to in subsequent decisions, and never overruled, that question must be answered in the affirmative.

In *Bissell v. Penrose* the case was this: the claim was for 4,000 arpents of land by the five sons of Vasques, one of whom, Benito, had assigned his share to one Rudolph Tillier. Tillier filed his claim for confirmation with the land commissioners. It was confirmed as follows: "The board are unanimously of the opinion that the claim ought to be confirmed to said Benito, Antoine, Hypolite, Joseph, or Pierre Vasques, or their legal representatives." It was held that this confirmation inured to

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the benefit of Tillier, who filed and proved up the claim before the land commissioners, although his name does not appear as the confirmer. Nelson, J., in delivering the opinion of the court, says: "By that act (the act of 1805) every person claiming lands, etc., shall deliver to the recorder a notice, etc., of the nature and extent of his claim, and also the grant, order of survey, deed, conveyance, or other written evidence of his claim, to be recorded; provided, at the same time, in the case of a complete grant, that the claimant need only record the original grant, together with the order of survey and plat, all other conveyances and deeds to be deposited with the recorder—thereby making a distinction between the two cases as it respects the derivative title, and in both clearly contemplating that the assignee might be a claimant." The judge then proceeds to say: "This is the view taken of the question in *Strother v. Lucas* on each occasion when it was before this court. (6 Pet. 772; 12 Pet. 458.) It was there held that the confirmation was to be in favor of the person claiming it."

*Boon v. Moore*, 14 Mo. 420, presents this case. The claim in question in that suit was filed before the recorder of land titles in 1808, by Jesse Richardson, assignee of Mackay, who was assignee of David Cole, the original concedee. The transfers from Cole to Mackay, and from Mackay to Richardson, were produced and filed with the commissioners. The confirmation, however, was to "David Cole, or his legal representatives." Copies of these transfers were offered in evidence and excluded. The propriety of their exclusion was a question before the Supreme Court. In reference to it, Napton, J., says: "If the confirmation by the act of Congress of July 4, 1836, was to Richardson, and not to the legal representatives of Cole, the admissibility of these copies is an immaterial question. We understand the Supreme Court of the United States to have distinctly decided this question in the case of *Bissell v. Penrose*."

There can be no doubt as to what the court understood the effect of the decision in *Bissell v. Penrose* to be. If the exclusion of the copies was an immaterial matter, it was so because the confirmation adjudicated Richardson's title, and thereby

superseded the necessity of going into proof of its sufficiency prior to the confirmation. And this is the doctrine laid down in *Boon v. Moore*, as recognized by the judge delivering the opinion of the court in *Hogan v. Page*, 22 Mo. 65. In *Hogan v. Page*, 2 Wall. 605, it was held that a confirmation to the original grantee, or his "legal representatives," embraced representatives of such grantee by contract as well as by operation of law; leaving the question open in a court of justice as to the party to whom the confirmation should inure. But in that case the "minutes did not record the fact that any assignment of the land from Conde (the original grantee) to Lamonde (the claimant) had been presented to the board, or that other proof was made of such conveyance;" and the absence of that "fact" marks exactly the difference between that case and the class of cases it represents, and *Bissell v. Penrose*, *Boon v. Moore*, and other like cases. Where the assignee claimant made no proof of his derivative title before the board, the confirmation is open; but where that proof was supplied and submitted to the judgment of the commissioners, so that they could pass upon that as well as upon the merit of the original concession, the confirmation inures to the claimant, although his name is omitted in the form of confirmation. Such seems to be the result of the authorities. In *Connoyer v. Washington University*, 36 Mo. 481, that principle seems to be recognized by the court, although it held that in that case the defendants failed to bring themselves within its scope.

The same judge (Nelson) who delivered the opinion in *Bissell v. Penrose* also delivered the opinion in *Hogan v. Page*, and clearly distinguishes between the two classes of cases, thus: "On looking into the cases cited on the part of the plaintiff, it will be seen that the confirmations which there appear were either to the assignee claimant by name, or in general terms; that is, to the original grantee or his legal representatives; and where, in the latter form, it was the assignee claimant who had presented the claim before the board, and had furnished evidence before it of his derivative title, and which had not been the subject of dispute." The present case, therefore, is different from either of



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the cases referred to. There is here no abandonment of the principle announced in *Bissell v. Penrose*, but rather an affirmance and reiteration of it. That principle, as illustrated and applied in *Boon v. Moore*, clearly meets the facts of the case before us. What could the distinction drawn by Judge Nelson in the *Hogan* case between assignee claimants who had, and those who had not, filed the evidence of their derivative titles, avail, unless it placed the former on a better footing than the latter? And how were the parties filing the evidence benefited by that fact, unless the confirmation thereupon awarded is treated as an adjudication of the derivative as well as the original title? If this result does not follow, it is difficult to perceive what substantial reality there is in the distinction taken, and upon which the *Hogan* case appears to turn.

The result of these views involves an affirmance of the judgment of the Circuit Court, which was for the defendants. The other judges concur.

On motion for a rehearing, CURRIER, Judge, delivered the opinion of the court.

The principle laid down in *Bissell v. Penrose*, and in the cases following that adjudication, is not drawn in question by the plaintiffs' motion for a rehearing; but it is insisted that the facts of the present case do not bring it within the influence of these decisions, it being claimed that the records of the recorder of land titles show that Butler, and not Bankson, was the party claimant who forwarded the confirmation. It is insisted that the United States land commissioners' records must "go under" when they come in conflict with the recorder's entry, which assumes to name and identify the claimant. We take a different view of the legal effect of these records, and are of the opinion that the titles or headings which the recorder saw fit to prefix to his record of the papers in the case, must yield if they come in conflict with the records of the land commissioners. These records show that Bankson was recognized by the commissioners as the legal and only claimant before them, and that they adjudicated the claim in conformity with that fact. We adhere,

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therefore, to our opinion that the Circuit Court, by its instruction, declared the true legal effect of the action of the commissioners. It was the duty of the recorder to record the title papers delivered to him for that purpose; but the title or heading prefixed by him to the record of the papers in a particular case neither fixed the character of the papers recorded, nor determined the fact as to who the claimant was. These were matters not for him, but for the land commissioners, to pass upon.

But it is said that a stranger can not set up an outstanding equity against the party holding the fee. Butler had no fee to the New Madrid lands unless he acquired it through the confirmation, and that brings us back again to the question respecting the legal effect of the action of the United States land commissioners. Prior to the confirmation neither party held any interest in the lands beyond a mere equity. If the confirmation was to Bankson and inured to his benefit, we do not understand it to be claimed that the plaintiffs have a title upon the strength of which they can recover in this case.

The motion is overruled.

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SAMUEL MCCARTNEY *et al.*, Appellants, *v.* JOHN H. GARNHART,  
Respondent.

1. *Trade-marks, injunction against use of—What imitation will justify, etc.*  
—To justify an injunction against a defendant from the use of a certain brand as an alleged counterfeit or imitation of that of plaintiff, it should at least appear that the resemblance between the two brands was sufficiently close to raise the probability of mistake on the part of the public, or design and purpose to mislead and deceive on the part of the defendant.

*Appeal from St. Louis Circuit Court.*

*S. S. Boyd*, for appellants.

I. The imitation of an original trade-mark need not be exact or perfect. It may be limited and partial; nor is it requisite that the whole should be pirated. (44 Mo. 178; 47 Barb. 469; 1 Ch. Ap. Cas. 194.)

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II. It is not necessary to show that any one has in fact been deceived; for if the court sees that complainant's trade-marks are simulated in such a manner as probably to deceive customers or portions of his trade or business, the piracy should be checked at once by information. (44 Mo. 178; 2 Sandf. 609; 23 Eng. L. & E. 53-4; 3 Sandf. Ch. 586; 25 Barb. 76; 3 Barn. & Cress. 543.)

*Cline, Jamison & Day*, for respondent. ✓

CURRIER, Judge, delivered the opinion of the court.

The plaintiffs rectify whisky, and brand a class of their goods with a device which they claim as their trade-mark. The device consists of the representation of two anchors placed near together in an upright position, the upper parts inclining outward, with a rope attachment. Over the device, in circular form, are the initials S. McC. The device and letters are stenciled upon the heads of barrels containing a particular article of whisky, known in the trade as "double anchor," or "double anchor whisky."

This suit is brought to enjoin the defendant from using in his whisky trade an alleged counterfeit or imitation of the plaintiffs' brand. The supposed imitation consists of the representation of two picks placed near together in an upright position, with the handles inclining inward. Between the handles is suspended a pair of balances or scales. The defendant's name is placed over the picks, and the words "Old Bourbon" underneath; the whole inscription reading "J. H. Garnhart's Old Bourbon." The defendant stenciled this brand upon the heads of his whisky barrels. He used the whisky thus put up and branded for his mountain trade, and called it "pick brand."

The "picks" in the defendant's brand are claimed to be an imitation of the "anchors" in the plaintiffs' brand. That is the only point of resemblance in the two brands insisted upon. In all other particulars they are wholly dissimilar. The respective brands are transferred to paper and appear in the record, and are explained in the testimony.

The defendant's "picks" resemble the plaintiffs' "anchors"

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substantially as a real pick resembles a real anchor of reduced dimensions. One who would mistake a miner's pick for a diminutive anchor might confound the defendant's brand with that of the plaintiff; and hardly otherwise. The pick in the defendant's brand is quite as good an imitation of the article intended to be represented as is the anchor in the brand of the plaintiffs of the nautical instrument there sought to be represented. The resemblance between the two brands is too slight to be likely to mislead; and there is nothing in the testimony which shows that the defendant sought to dispose of his whisky as that of the plaintiffs, or of the plaintiffs' rectification. No actual fraud is shown; nor is it shown that any one has in fact been misled by the defendant's brand, mistaking it for that of the plaintiffs. The plaintiffs' case hangs solely upon the supposed resemblance between the defendant's stenciled pick and the plaintiffs' stenciled anchor, and the similarity of uses to which the two were respectively applied. We can not found upon that resemblance and use the conclusion that the public are likely to be misled by it, to the prejudice of the plaintiffs, or to the prejudice of their customers.

To justify an injunction, as prayed by the plaintiffs, it should at least appear that the resemblance between the two brands was sufficiently close to raise the probability of mistake on the part of the public, or design and purpose to mislead and deceive on the part of the defendant. Neither sufficiently appears, and the judgment must therefore be affirmed. The other judges concur.

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SINAI D. JOHNSON, Respondent, v. DEMAS JOHNSON, Appellant.

1. *Contracts—Marriage by slaves may be validated after emancipation.*—Slaves, in entering into marriage, do a moral act; and although not binding in law, it is no violation of any legal duty; and, as in the case of other parties incapacitated (as minors or insane persons), the contract may be assented to and ratified after the incapacity or disability is removed. It can make no difference that in his earlier days the husband had been already married; his first marriage had no legal existence. He was at liberty to repudiate it at pleasure; and by his continuing to live with his second wife, and acknowledging her as his lawful wife, after he had obtained his civil rights, he disaffirmed his first marriage and ratified his second.

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*Appeal from St. Louis Circuit Court.**H. A. Haussler and J. Wickham, for appellant.*

Marriage being a civil contract, to which the consent of the parties capable in law of contracting is essential, the second pretended marriage of appellant was void. (Anderson v. Poindexter, 6 Ohio St. 622; Smith v. The State, 9 Ala. 990-6; Howard v. Howard, 6 Jones, 235; Malinda v. Gardner, 24 Ala. 719; State v. Samuel, 2 Dev. & Bat. 177.) Marriages of slaves are to be deemed null and void. (Bishop on Mar. and Div., ed. 1864, §§ 156-8; Stanley v. Nelson, 28 Ala. 514; R. C. 1845, ch. 167, p. 1014, § 7; Elliott v. Gurr, 2 Phillimore, 16; Browning v. Reane, *id.* 69; Crump v. Morgan, 3 Ired. Eq. 100; Bishop on Mar. and Div., § 139, and cases cited.) Incompetency to contract, on part of one of the parties, will render the marriage void. (Clement v. Mattison, 3 Pick. 93; True v. Ranney, 21 N. H. 52; Reeve on Dom. Rel. 315, note 1, and cases cited; 3 Richards' Eq. 263; State v. Van Leer, 5 Md. 91; Stanbery v. Wilson, 28 Ala. 514; Anderson v. Poindexter, 6 Ohio St. 622; Howard v. Howard, 6 Jones, N. C., 235; Malinda v. Gardner, 24 Ala. 719; Smith v. State, 9 Ala. 990; State v. Samuel, 2 Dev. & Bat. 177; Conn. v. Clements, 6 Burr. 206-11; Davis v. Evans, 18 Mo. 249; Bishop on Mar. and Div., §§ 46, 201.) As to void common-law marriages, see 2 Kent, 86; 1 Mass. 240; 7 Mass. 54; Mass. Dig. 247-8, etc.

*S. N. Taylor, for respondent.*

The slave marriage of appellant with Elizabeth, while they were slaves, was such a marriage as he could repudiate at any time while remaining a slave. (1 Bishop on Mar. and Div., §§ 157-9, 162; Malinda *et al.* v. Gardner, 24 Ala. 719; Smith v. The State, 9 Ala. 996.) In 1849 appellant, still being a slave, married respondent, which act was a complete repudiation of his slave marriage with Elizabeth. Appellant constantly lived and cohabited with respondent for the period of thirteen years. His thus living and cohabiting with respondent for so long a period

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after his manumission was a legal assent and ratification of his marriage with her, and made it a valid, binding marriage. (1 Bishop on Mar. and Div. 159-163; McReynolds v. State, Law Reg. Oct., 1868, p. 736; Girod v. Lewis, 6 Martin, La., 559; 1 Bishop on Mar. and Div., §§ 140-142; Cole v. Cole, 5 Sneed, 57; 2 Kent's Com. 39; Mrs. Ash's Case, Freeman's Ch. Eng. 269; Wightman v. Wightman, 4 Johns. Ch. 343.) So cohabitation, after reaching the age of consent, is a legal assent and ratification of the marriage of an infant, and subjects the parties to all the liabilities and rights of a valid marriage. (Reeve's Dom. Rel. 355; 1 Bishop on Mar. and Div. 150; Whart. Crim. Law, §§ 26, 28; Aymar v. Roff, 3 Johns. Ch. 49; Tyler on Inf. and Cov. 125, § 81; 1 Blackst. Com. 436; Reeve's Dom. Rel. 236; Allis v. Billings, 6 Metc. 415.)

WAGNER, Judge, delivered the opinion of the court.

The respondent instituted a suit for divorce against the appellant, in the St. Louis Circuit Court, on the ground of cruel and inhuman treatment, and, upon a hearing, a divorce and alimony were decreed. The parties are both negroes, and the appellant was formerly a slave; and the question presented by the record is new in this court, and may be of interest to persons similarly situated.

It seems that Demas, the appellant, was a slave in Virginia, belonging to a Mr. Mason; that whilst he lived there he married a negress, also a slave, by whom he had three children. His wife and children were sold to some person in Texas, and his master took him to Mexico, from whence he was brought to St. Louis. After his arrival in St. Louis, and in the year 1849, he married the respondent, then a free woman of color, and in about one year thereafter he was emancipated by his master. When he obtained his freedom he continued to live and cohabit with the respondent as his wife for about thirteen years, at the expiration of which time she left him, for reasons stated in the petition, and commenced this proceeding for a divorce.

For the appellant it is insisted upon, in argument, that as the marriage took place whilst he was a slave, it was void, and as no



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solemnization was had subsequent to his manumission, this suit is not maintainable. In this State marriage is considered a civil contract, to which the consent of the parties capable in law of contracting is essential. In none of the States where slavery lately existed did the municipal law recognize the marriage rites between slaves. They had no civil rights except where the right to freedom was involved, in which case they could prosecute a suit by their next friend to vindicate their claim. They were responsible for their crimes, but unconditional submission to the will of their master was enjoined upon them. By common consent, and universal usage existing among them, they were permitted to select their husbands and wives, and were generally married by preachers of their own race, though sometimes by white ministers. They were known and recognized as husband and wife by their masters and in the community in which they lived; but whatever moral force there may have been in such connections, it is evident there was nothing binding or obligatory in law.

"Marriage," says the court in North Carolina, "is based upon contract; consequently the relation of man and wife can not exist among slaves. It is excluded both on account of their incapacity to contract, and of the paramount right of ownership in them as property." (Howard v. Howard, 6 Jones, N. C., 235, 236.) So, in Alabama, the Supreme Court says: "Persons in that condition are incapable of contracting marriage, because that relation brings with it certain duties and rights with reference to which it is supposed to be entered into. But the duties and rights which are deemed essential to this contract are necessarily incompatible with the nature of slavery, as the one can not be discharged nor the other be recognized without doing violence to the rights of the owner. In other words, the subjects of the contract must cease to be slaves before the incidents inseparable to the relation of marriage, in its proper sense, can attach." (Malinda v. Gardner, 24 Ala. 719, 727.)

Mr. Bishop sums up the substance of the authorities when he says: "It is the present established law, wherever slavery prevails in this country, that the marriages of slaves are to be deemed

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null and void." (1 Bishop on Mar. and Div., § 156.) The slaves being denied all civil rights, could they, in a state of slavery, contract marriage so as to be binding upon them after their emancipation? Whilst marriage is a civil contract, and the assent of capable minds is necessary to its validity, still it differs in many particulars from ordinary, general, or commercial contracts.

In speaking on this subject, the Court of Appeals in Kentucky uses the following language: "Marriage, though in one sense a contract—because, being both stipulatory and consensual, it can not be valid without the spontaneous concurrence of two competent minds—is nevertheless *sui generis*, and, unlike ordinary commercial contracts, is *publici juris*, because it establishes fundamental and most important domestic relations. And therefore, as every well-organized society is essentially interested in the existence and harmony and decorum of all its social relations, marriage, the most elementary and useful of them all, is regulated and controlled by the sovereign power of the State, and can not, like mere contracts, be dissolved by the mutual consent only of contracting parties." (Maguire v. Maguire, 7 Dana, 181; Dickson v. Dickson, 1 Yerg. 110; Duntze v. Levett, 3 Eng. Ec. 360; Sto. on Conf. Laws, §§ 109, 111; 1 Fras. Dom. Rel. 88.)

The common law was changed in this State with reference to marriages, and the whole subject-matter was governed by municipal regulations. But the statutory law was exclusively applicable to free persons, and did not reach those persons who were in a state of slavery when the marriage was contracted. Such being the case, we must look to the common law for our guidance, and decide this question according to its recognized rules, and by the application of analogous principles. Though the slave could make no civil contract, and his marriage was absolutely void in legal contemplation, yet it is apparent there was the moral assent of the mind.

It was a rule of the common law that if a boy under the age of fourteen, or a girl under twelve, marries, the marriage is inchoate and imperfect, and when either of them comes to the

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age of consent, they may disagree and declare the marriage void, without any divorce or sentence of the spiritual court; but it is so far a marriage that if, at the age of consent, they agree to continue together, they need not be married again. (1 Sharsw. Blackst. Com. 436.)

The rule is well established that where marriages have been entered into, where one of the parties was laboring under insanity, if the parties continue to cohabit after a lucid interval, the cohabitation will render their marriage good. Shelford remarks: "There is authority for the proposition that a marriage by a *non compos*, when of unsound mind, is rendered valid by consummation during a lucid interval." (Shelf. Mar. and Div. 197.) And it has been held that a lunatic, on regaining his reason, may affirm a marriage celebrated while he was insane, even though a statute had required a particular form of solemnization. (1 Bishop on Mar. and Div., § 140; see also Wightman v. Wightman, 4 Johns. Ch. 343-5.)

We may now apply the foregoing principles to the case at bar. The slave, in entering into marriage, did a moral act; and although not binding in law, it was no violation of any legal duty. If, after the emancipation, there was no confirmation by cohabitation or otherwise, it is obvious there would be no grounds for holding the marriage as subsisting or binding. But, as in the case of other parties incapacitated, we perceive no good reason for holding that the contract may not be assented to and ratified after the incapacity or disability is removed. And in harmony with these views, the Supreme Court of Louisiana have expressly decided that a marriage contracted in a state of slavery may be ratified and become binding by mutual assent and cohabitation after the slaves have attained their freedom. (Girod v. Lewis, 7 Martin, 559.) The court reasoned that it was clear that slaves had no legal capacity to assent to any contract. With the consent of their masters, they might marry, and their moral power to agree to such a contract or connection as that of marriage could not be doubted; but in a state of slavery it could not produce any effect, because slaves were deprived of all civil rights. Emancipation gave to the slave his civil rights, and a contract of

marriage, legal and valid by the consent of the master and moral assent of the slave, from the moment of freedom, although dormant during the slavery, produced all the effects which resulted from such a contract among free persons.

In the very recent case of *McReynolds v. The State* (5 Coldw. 18), it was held that if, after emancipation, the parties live together as husband and wife, and before emancipation they were married in the form which either usage or law had established for the marriage of slaves, their subsequent mutual acknowledgment of each other as husband and wife should be held to complete the act of matrimony so as to make them lawfully and fully married from the time at which their subsequent living together commenced. I am therefore of the opinion that as the appellant, when he was emancipated, continued to live and cohabit with the respondent and constantly acknowledged her as his wife, the marriage should be recognized and be deemed valid and binding. That in his earlier days he was previously married can make no difference. His first marriage in his then state of servitude had no legal existence; he was at liberty to repudiate it at pleasure; and by his continuing to live with respondent and acknowledging her as his lawful wife after he had obtained his civil rights, he disaffirmed his first marriage and ratified the second.

The provisions of the statute (2 Wagn. Stat. 931, §§ 12-16) which have been referred to, can have no bearing on the case. They were not passed and did not take effect till some time after this suit was instituted. The parties never cohabited together after the above sections became operative, so as to be within the reach of their prohibitions or incur their penalties.

The finding of the court seems to be well borne out by the testimony, and we are not inclined to review it. As to the question of alimony, the decree will not be disturbed on that account. The evidence shows that the appellant's property is valued at between \$5,000 and \$6,000. The court awarded the respondent \$1,000. That is not exorbitant, although in this particular case we should have been satisfied had the sum been less; yet there is nothing in it justifying our interference.

Judgment affirmed. The other judges concur.

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ANN C. VOULLAIRE, Respondent, v. SEYMOUR VOULLAIRE,  
Appellant.

1. *Infants — Guardians — Religious faith.*—The provision (Wagn. Stat. 675, § 21) which prohibits committing the care of a minor to a person of religious persuasion different from that of the parents of the minor, if another suitable person can be found, etc., was adopted to secure in this matter the absolute equality before the law of all forms of religious faith. But where the record does not show that any person of the faith of the parents offered to take the children, and a person of different faith, but every way suitable otherwise, offered to take charge of them, *held*, that the action of the court in committing the care and custody of the children to this person was in no respect a violation of that provision.
2. *Circuit Court of St. Louis county — Judges, duties of — Practice, civil — Motion for a new trial.*—There is no substantial difference between the duties of the several judges of the St. Louis Circuit Court at special term and those of the Circuit Courts of the State. The court, at general term, may distribute business among the several judges; but when one enters upon a trial, he is independent of the control of the other judges, except in review of his acts, and has the same power at special term to vacate and modify its judgments, decrees, or orders, rendered or made at such term, as if said court was constituted with a single judge. It is the duty of the judge who tries a case to go through with it, and hear a motion for new trial if made; and he can not refuse to hear such motion, or transfer the case and motion to any one of his colleagues for final disposition.

*Appeal from St. Louis Circuit Court.*

*Moody and Neil, and Lackland & Martin, for appellant.*

I. The father is the natural and legal custodian of his children, unless shown to be an unfit custodian. (The People v. Merriam, 25 Wend. 64; 18 Wend. 637; 3 Hill, 399; 19 Wend. 16.) There is no evidence in the record tending to show that defendant is an unfit custodian of these children.

II. The case was tried in court-room No. 1, before Judge Rombauer, who, after hearing and deciding the case, refused to hear or decide the motion for a new trial, and sent the case to court-room No. 2 (Judge Smith) for trial. The motion for a new trial was improperly heard and determined by Judge Smith. He did not see the witnesses nor hear their testimony. He could not judge of their credibility, nor of the case. The only judge who can properly pass upon a motion for a new trial is the one



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who heard the evidence and saw the witnesses. (Woolfolk v. Tate, 25 Mo. 597; Gen. Stat. 1865, p. 633, §§ 1, 25; *id.* 888, § 7; *id.* 634, §§ 13-14.)

III. The court erred in refusing to hear the proof offered by the appellant in the court below in support of all the allegations in his petition for review as to the character of respondent.

IV. The court erred in allowing the respondent in the court below to prove the unfitness of the appellant to have charge of the children without first allowing the appellant to prove all of the allegations set forth in his petition for review, and in allowing the respondent to prove the conduct of appellant while the relation of husband and wife existed, and upon the decree of divorce. (People v. Mercier, 3 Hill, 419-20; Bish. on Mar. and Div. 632; 30 N. H. 274; 14 Pick., Mass., 510.)

V. The decree made by the court below, upon the petition for review, filed by the appellant, was erroneous, because the grandparents are of the Protestant faith, and the children are of the Catholic faith, through their own parents (Gen. Stat. 1865, p. 468, § 21), and because it gives the care of the sons to the appellant upon condition that he transports them out of this State (the residence of the appellant) to the assistant care of Mrs. Peterson of Cincinnati. The decrees of the Circuit Court have no extra-territorial effect or operation. The Circuit Court of St. Louis county had no right to send the children of defendant to Cincinnati, Ohio, because the court would thereby send them beyond its jurisdiction, and lose all control over them.

*A. W. Mead*, for respondent.

I. The only question of fact involved in this case is whether or not the appellant here was a proper person to have the care and custody of the children. This question was decided by the judge of Circuit Court No. 1, on the evidence in the cause; and this court has repeatedly decided that it will not weigh the evidence or disturb the judgment of the lower court on the ground that the verdict or judgment is against the weight of evidence.

II. The court had the right to appoint Mr. Murray guardian of the children, although he was of different religious persuasion



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from the parents of the children. "A minor shall not be committed to the guardianship of a person of religious persuasion different from that of the parents, if another suitable person can be found." (Gen. Stat. 1865, p. 468, § 21.) The court below found that appellant was unfit to have the guardianship of the children, and no person of the same religious persuasion as the parents of the children offered to take the guardianship of the children. The court, therefore, was compelled to appoint Mr. Murray guardian of the female children, and, in default of Mr. Voullaire accepting the conditional guardianship of the male children, guardian of them all.

III. The judge of Circuit Court No. 1 properly transferred the case to Circuit Court No. 2 for decision on motion for new trial. They both constitute one court, and there is no statute law to the contrary. I think it does not lie in appellant's mouth to object to the transfer of the case (with the notes of testimony from which the bill of exceptions was made up) to another judge.

BLISS, Judge, delivered the opinion of the court.

In September, 1867, the plaintiff instituted in the St. Louis Circuit Court a suit against the defendant, her then husband, for divorce, and in due time obtained a decree dissolving the marriage relation, and giving her the custody of her five children. She soon after intermarried with Isaac M. Ruth; and in November, 1868, the defendant presents a petition for a review of so much of the divorce as gives to the plaintiff the custody of the children, and asks to have them restored to him. He alleges various reasons for his request, some of which affect the character of the mother, and all of which go to her ability and fitness to rear them; and at the hearing she and her said last husband, who is made a party to the petition for review, appear and admit of record that they are unable to take charge of and educate said children, and disclaim all right to their care and custody. But notwithstanding this disclaimer, the defendant insisted upon introducing evidence against the character and fitness of the plaintiff, which the court very properly refused to admit, and held that the defendant was *prima facie* entitled to the custody and

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control of the children, inasmuch as she to whom the court had committed them had given them up. The plaintiff then offered to prove that the defendant, their father, "was not a proper and competent person to have the custody and care of said children;" and, against the protest of defendant, the court permitted her to do so. A large amount of testimony upon the subject was offered upon both sides, all of which I have read with care, and I can not see how the court could have come to a wiser conclusion than the one arrived at, and looking to the good of the children, which is the primary object, what better disposition could have been made of them. The court decided that the father, from his temperament and other reasons, was an unsuitable person to have the care of them; and it appearing that a sister of defendant was living in good circumstances in Cincinnati, and that Mr. Murray, the step-father of the plaintiff, lived in St. Louis, also in good circumstances, the latter of whom appeared in court and offered to take charge of them, the following order in substance was made: It was ordered that the two boys, Belmont and Alphonso, be delivered to their father upon condition that within thirty days he places them with his sister in Cincinnati, to be put to school, and that he keep them there until the further order of the court; that George B. Murray be appointed guardian of the three girls, Italia, Elmira, and Enola, with instructions not to influence their religious belief contrary to the faith of their parents; that the access of their mother to them be at the house of their guardian, which, except in sickness, is not to be oftener than once a month; that the said Seymour Voullaire, within five days, file his acceptance of the conditional custody of his said boys; otherwise that the said Murray be guardian of them as well.

The mother was satisfied with this order, but the father refused to accept the custody of the boys upon its conditions, and filed a motion for a new hearing, which the court refused to hear, but sent it, with all the papers and minutes of testimony, to another judge of the same court, who overruled the same. This change was resisted and excepted to by the petitioner for review. The court, at general term, affirmed the decree, and the case is brought before us.

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I have expressed an approval of the decree, and, unless there are errors of law in the record, we should feel bound to sustain it. There are no matters so unpleasant, and which involve such grave responsibilities, as the disposition of children upon the violent disruption of families; and it is that, chiefly, that renders divorcees so much to be deprecated. This duty in the case at bar seemed to be performed with as much delicacy and consideration as could be brought to bear upon such a case. Mr. Murray's family and the sister spoken of in Cincinnati are the only relatives of the children, except the parents, that are shown in the record. The eldest daughter, Italia, being at the trial, a little over a year ago, between ten and eleven years of age, had lived with her grandparents for five or six years, and expressed in court a strong desire to continue to live with them. Belmont, who is older, was said to be becoming irregular in his habits; and if anything is to be made of them, they should all be placed at once under kind but firm control. This they would not receive from either parent. One of the strong reasons given by the judge who tried the case, in an excellent opinion filed with the briefs, why the father should not have the absolute custody of the children, was his conduct upon the trial. He there insisted more than once, notwithstanding every legal reason for it was gone, upon his right to introduce evidence to blacken the character of his former wife, and excepted to the action of the court which bridled him. Had he been governed by the feelings that should have possessed him, nothing could have been more welcome than to be relieved of the necessity of such an exposure, if there was any to make. The instinct of the court naturally revolted at the idea of placing the children of the divorced wife in the custody of one, father though he be, who, for its own sake, panted to hold a picture before them that would greatly tend to their own degradation. This was not the only or main reason for the action that was had, but it could but contribute to impress other testimony.

The appellant raises objection to the action of the court as matter of law. He testifies that he and the mother are Roman Catholics, and desires that the children be raised in that faith,

but that Mr. Murray's family are Presbyterians. Section 21 of the chapter of Guardians and Curators (Wagn. Stat. 675) is as follows: "A minor shall not be committed to the guardianship of a person of religious persuasion different from that of the parents, or of the surviving parent, of the minor, if another suitable person can be procured, unless the minor, being of the proper age, should so choose." This provision was adopted to secure, so far, the absolute equality before the law of all forms of religious faith, and in view of the practice in some countries of seeking to strengthen the dominant faith by means of the compulsory custody of the young. The court evidently sought to conform its order to the spirit of this section, but still, had any Catholic family, as near and as interested in the welfare of the children as that of Mr. Murray, and suitable otherwise, offered to take the children, it would have been the duty of the court to have committed them to its guardianship. But the record does not show that any Catholic, suitable or otherwise, offered to take the children, and it was not reasonable to expect it of any outside the circle of relatives. Mr. Murray had property and no children. Mrs. Murray was their grandmother; one of the daughters had been partly nurtured by them; they were mutually attached; no opportunity offered of guardianship in the parents' faith; and what more just and natural, as well as lawful, than to commit them to this family? The father was given the boys, if he would send them to their only other relative, his sister, to attend school. He declined to receive them upon this condition, and, as the court could not send them there, they, too, were placed under Mr. Murray's care.

The other legal objection to the action of the court was its refusal to entertain the motion for a new trial, and sending it to another judge for hearing. I do not find any substantial difference between the duties of the several judges of the St. Louis Circuit Court, at special term, and those of the Circuit Courts of the State. (See *Tilford v. Ramsey*, 43 Mo. 410.) The court, at general term, may distribute business among the several judges (Gen. Stat. 1865, p. 889, § 15); but when one enters upon a trial, he is independent of the control of the other judges, except

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in review of his acts, and has "the same power at special term to vacate or modify its own judgments, decrees, or orders, rendered or made at such term, as if the said court were constituted with a single judge." (*Id.* § 13.) It was the duty of the judge who tried this cause to go through with it and entertain, and himself hear, the motion. It is one of those matters that peculiarly belong to the original case itself. There is large discretionary power in the judge, and the law very properly gives him an opportunity to review his decisions and correct his errors before the case can go to the appellate court. After the scurrilous and wholly inexcusable attack upon him in the papers, by the appellant, it is easy to appreciate his motive in sending the case for final disposition to another judge; but it furnished no legal reason, and the one who tried the cause should have heard and passed upon the motion.

For this error, it becomes necessary to reverse the judgment of general term and remand the cause, not necessarily for a new trial, but with directions to the judge who tried the case to hear and decide the motion for a new hearing. The other judges concur.

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—Where an executor obtained a decree for the sale of real estate of his decedent by representing that such sale was necessary to pay the debts of the estate, one of the principal creditors being a minor heir of the decedent, who had no guardian, and the executor having purchased a large part of the other debts at a large discount; and where the debt due the minor heir had never been probated, and the real estate sought to be sold, in which this minor as an heir was interested, was sure to increase in value, making it more for his interest to receive the land ultimately than to receive the proceeds realized by an immediate sale — *semble*, that such a state of facts would show that the decree was obtained by fraud upon the court, and be alone sufficient to entitle the heir to have the sale under such decree set aside.—*Id.*

6. *Administration—Purchase by executor of debts against the estate—To whom the benefits belong.*—An executor has no claims against an estate for the face of claims which he purchases at a discount. He may so purchase, but not for himself; and all his transactions in that regard should be treated as for the estate, whose agent and servant he is.—*Id.*

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2. *Equity—Attachment—Innocent purchaser for value, etc.—Cloud on title, bill in equity for removal of.*—Under an attachment issued from one county, certain land was seized in another; but there was no record evidence in the latter county either of its issue or of any proceedings under it. Prior to the levy it had been conveyed away by defendant, and passed through two or three hands. Subsequent to the attachment it was purchased by a third party, who, after payment of the purchase money, and at the delivery of the deed, for the first time got notice of the attachment. Judgment being had on the attachment, the land was sold under execution, and bought in by plaintiff, the attaching creditor. Plaintiff in the attachment afterward brought his bill in equity against the purchaser to remove the cloud on the title acquired by his purchase under the execution. *Held*, that the bill contained no equity, and should be dismissed.—*Hamilton v. McClelland*, 424.
3. *Attachment—Garnishment—Production of note—Construction of statute.*—Section 26 of the statute touching garnishment (Wagn. Stat. 668) does not contemplate an original proceeding to compel defendant to file in court a promissory note theretofore executed by plaintiff to defendant, although proceedings in attachment had been commenced by a third party against defendant, wherein plaintiff had been summoned as garnishee. The statute only aims to give the garnishee in a pending action an opportunity to protect himself by compelling the attachment debtor to produce the note in controversy, or show a sale or transfer if one had been made.—*Murphy v. Wilson*, 427.

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**BANKS AND BANKING.**

1. *The State Bank act not in conflict with section 6, article 9, of the State constitution.*—Section 6 of the act touching the State Bank (Sess. Acts 1865, p. 16) is not in conflict with section 6, article 9, of the State constitution. That the act provided that the purchase money arising from the sale of the stock held for school purposes by the State might be paid in the bonds and coupons of the State, does not necessarily make it an investment in either State bonds or obligations. The State had the undoubted right to sell, and it was responsible to the school and seminary fund for the price which it received growing out of the sale; but if it took in payment its own indebtedness, and replaced the amount in money from the treasury, there would be nothing objectionable in the transaction.—*State v. Bank of the State of Missouri*, 528.

## BANKS AND BANKING—(Continued.)

2. *Act of March 5, 1866, touching State Bank, relates to but one subject.*—The act touching the State Bank is not in conflict with section 32, article 4, of the State constitution. The reorganization of the bank, the selling of the stock, and the investment of funds were all matters intimately connected and blended, and had a natural coherence and congruity, and might be well combined in the same bill.—*Id.*
3. *Act touching State Bank—Sale of stock by agent appointed by the State—Authority must be strictly followed—Caveat emptor—Ratification by governor—Fact that State loses nothing, no argument for sale.*—The intention of section 5 of the act of March, 1866, touching the State Bank, was to advise the public that, up to a certain time, proposals might be made for the purchase of the stock held by the State, and that all should come in open, free, and fair competition, and to guard against unfairness and preclude the possibility of connivance and fraud. And a sale by the agent of the State, after the time advertised and without notice, amounted simply to a private sale in total disregard of the law. In such a state of facts, *held*, as follows:
  1. The sale was not within the authority committed to the agent, and was not binding on the State.
  2. The agency being conferred by statute and growing out of it, must be ascertained from the statute, and can not be varied or enlarged.
  3. When the agent is specially appointed by the State for the sale, the purchaser is presumed to know his authority; and if he purchases in a case where that special authority is not pursued, he purchases at his peril.
  4. The ratification of the sale by the governor, without the action of the Legislature, would not validate the contract. The governor himself was merely an agent, and incapable of confirming the act.
  5. The fact that the purchaser was the highest bidder does not affect the case. *Non constat* but the offer, notwithstanding, was insufficient; and in that case the proposal should have been rejected and the property again advertised according to law. To sanction the doctrine that one may make a contract with a public agent in known violation of law, and then hold its benefits on the ground that the State has suffered no loss, is of modern invention, and fatal to public interests.—*Id.*
4. On motion to stay execution on judgment against the bank for the amount of dividends due on the stock, *held*, 1st, that said motion could not be granted on the mere suggestion of other stockholders; 2d, that the fact that third persons purchased the stock, believing that the purchaser had good title, would not avail them. He could only purchase such title as he himself possessed, and his title was acquired under a law which every person was bound to know and construe at his peril.—*Id.*

## BILLS AND NOTES.

1. *Evidence—Certificate of deposit—Manual delivery, effect of.*—A. deposited a certain fund in bank, and, as evidence of his title, took a certificate of deposit payable to his own order. His title thus acquired must be presumed to continue until a divestment of it is shown, and a mere manual delivery of the certificate to B., without indorsement, and unaccompanied with evidence of a consideration paid, would not pass the title as against A.—*Vastine, Public Administrator, v. Wilding, 89.*

## BILLS AND NOTES—(Continued.)

2. *Promissory note—Indorsement—Proof of demand—Character of indorsement, question for jury.—Prima facie*, a party who writes his name on the back of a promissory note, of which he is neither payee nor indorsee, is to be treated as the maker of the note, and the payee is entitled to recover of him, without proof of demand on the maker and notice of non-payment. The question in what character he put his name on the back of the note was, in case of suit against him on the note, one of fact, exclusively for the jury.—*Western Boatmen's Benevolent Association v. Wolff*, 104.
3. *Contract—Bill of lading, negotiability of.*—In a qualified and restricted sense, a bill of lading has the attribute of negotiability, and may be transferred by indorsement and delivery.—*Davenport National Bank v. Homeyer*, 145.
4. *Contract—Bill of lading—Delivery without indorsement.*—The delivery of a bill of lading without indorsement, for value, transfers the property in the goods which it covers.—*Id.*
5. *Contract—Bill of lading attached to draft—Delivery without indorsement.* A. consigned to B., as his factor, 300 barrels of flour, and drew on him for the amount due. The draft was discounted by a bank on the faith of the bill of lading issued on the flour. The bill was attached to the draft as collateral security, and thus transferred to the bank, but was not indorsed or formally assigned, B. having refused to accept the draft. *Held*, that he was not at liberty to appropriate the flour or its proceeds to his own use. It was the property of the bank, for the purpose of meeting the dishonored draft.—*Id.*
6. *Bills of exchange and promissory notes—Accommodation parties—Liability.*—In commercial law, in the absence of a contract, the accommodation indorsers of a promissory note are not co-sureties, but are held in the order of their indorsements. As to the liabilities of parties to bills of exchange, there is but one rule known to the law. The drawer of the bill, if accepted, is bound to all other parties. Upon his default the drawer becomes obligated to the indorser, and the indorsers, if there are more than one, are bound in the order of their indorsements, and the accommodation parties to the bill should not be held to those for whose benefit it is drawn. But all the accommodation parties, as between themselves, are bound by the obligations which they assumed under the law merchant by becoming such parties.—*McCune v. Belt*, 174.
7. *Bills and notes—Parties—Co-sureties.*—Parties to bills and notes who intend to become co-sureties, should so agree, or should all be drawers merely; the payee and indorser should also be drawers.—*Id.*
8. *Bills and notes—Co-sureties—Equity—Indemnity of one inures to the benefit of all.*—It is a settled principle of equity that if one of several co-sureties subsequently takes a security from the principal for his own indemnity, it inures to the benefit of all the sureties, so far as they are co-sureties. But so far as he has a security for individual claims which he has against the same person, he is entitled to hold it.—*Id.*
9. *Debtor and creditor—Payments where several debts are due between the same parties, how applied.*—Under ordinary circumstances, when payments are made upon several debts due the same person, or upon a running account, the debtor making them may say upon which debt or item of account they shall apply, or, if he makes no election, the creditor may make the applica-

## BILLS AND NOTES—(Continued.)

- tion; and if neither of them decides the matter, then it must apply upon the oldest or one first maturing. And if the creditor once makes the application he shall not be permitted to change it, if afterwards circumstances make it for his interest to do so. But the rules are controlled by the equities of the case.—*Id.*
10. *Bills and notes—Part payment—Promise to pay remainder—Accord and satisfaction.*—Part payment of a note, coupled with a promise to pay the remainder on request, where the note itself was neither paid, canceled or surrendered, and no agreement was entered into on the one side either to surrender or release it, and no offer was made on the other to pay the balance due, amounted merely to an executory accord, and constituted no bar to suit on the note for the balance; nor would the fact that the transaction was in writing vary the result.—*Peterson v. Wheeler*, 369.
11. *Bills and notes—Contribution—Suit for, by co-surety—Statute of limitations.*—In case of suit for contribution by a surety on a bill of exchange against his co-surety, the statute of limitations commences running against his claim from and after the day on which he paid the original judgment on the bill, and not from the time when the bill was dated; and his claim is not operated on by the limitation of ten years, but by that of five.—*Singleton v. Townsend*, 379.
12. *Bills and notes, action on—Averments as to title—Pre-existing indebtedness—Manner of acquiring ownership—Allegation as to, immaterial.*—In a suit on a promissory note, the petition alleged that the payer transferred the note to plaintiff "for a valuable consideration to the payee in hand paid." *Held*, that proof showing the note to have been sold plaintiff in satisfaction of a pre-existing debt, sufficiently sustained the averment of the petition in regard to title. Under such averment the only material fact to be established was that of ownership; and the manner of acquiring it, whether by purchase with cash or other property, or by a discharge of pre-existing indebtedness, is of no importance.—*Wilson v. Murphy*, 409.
13. *Bills and notes, suits on—Pendency of attachment suit wherein defendant was garnishee, no defense, when.*—In a suit on a note by the assignee of the payee against the makers, the pendency of an attachment suit against the payee, wherein the makers were sued as garnishees, would constitute no defense if the assignment was in fact made before the garnishment. The pendency of the attachment might be pleaded in bar, provided the defense alleged that the note sued on was, *e. g.*, in fact still the property of the attachment debtor, and not simply charged by the creditor as his property. The garnishee may protect himself from liability to double payment by conforming to the requirements of the statute. (Wagn. Stat. 668, §§ 25-6.)—*Id.*
14. *Bills and notes—Payment of one note by another—Satisfaction and accord—Possession.*—A. was owner of a note made by B., deceased. The wife of A. was one of the heirs of B. The remaining heirs executed to A. their joint note for the amount named in that of B., less the proportion due from the wife of A. In a suit against the surety of B. on the note, *held*, that a receipt by A. of the note given by the heirs, unconditionally, and in full payment of the note of B., and a delivery of the latter to a surety of B. as paid, was a payment and satisfaction of the same; and that possession of the



## BILLS AND NOTES—(Continued.)

note by the surety after maturity was *prima facie* evidence of its payment.—*Lawson v. Gudgel*, 480.

15. *Bills and notes secured by deed of trust—Priority of payment, although all become due on default of payment on one note.*—Although by the express terms of a deed of trust the notes secured all became due upon the first default in payment, it did not follow that they stood on an equality in the distribution of the fund. Without an express agreement to that effect, the priority of claims in such case will not be impaired or interfered with. (*Mitchell v. Ladew*, 36 Mo. 526; *Mason v. Barnard*, *id.* 384, affirmed.)—*Hurck v. Erskine*, 484.
16. *Notes and bills—Probata and allegata—Verdict, amendments after.*—A., B., and C. were sued as the makers of a promissory note. The proof showed that a firm, of which A. and B. were two of the members, by its copartnership name, together with C., actually made the note. *Held*, that the defect in the description did not amount to a misdescription. The case was not one where the allegations were unproved in their entire scope and meaning, in the sense of the statute (Gen. Stat. 1865, p. 683; Wagn. Stat. 1058, § 1); and an amendment of the defect after judgment, in accordance with the statute Wagn. Stat. 1034, §§ 5, 6), furnished a perfect protection against a second suit on the same note.—*Schmidt v. Kellner*, 502.
17. *Bills and notes—Signature of maker on back of note—Co-surety, etc.*—It is of no consequence that the signature of the maker is placed on the back of the note, so that he signs it as a maker; nor does it make any difference that, as between himself and his co-makers, he is a surety.—*Id.*
18. *Bills and notes—Protest, notice of—Forwarding—Proof as to res gesta.*—In a suit against the indorsers on a promissory note, when a controversy arose as to the time and manner of forwarding the notices of protest, the declarations of one who delivered them to defendants, made at the time of delivery, were sought to be introduced in evidence, although it did not appear how he came by them, or that the notary delivered them to him, or had ever seen or heard of him. *Held*, that such declarations were not to be regarded as *res gesta* in connection with the forwarding of the notices, and were inadmissible.—*Merchants' Bank v. Berthold*, 527.

See ATTACHMENTS, 3.

## BILLS OF LADING.

See BILLS AND NOTES, 5. CONTRACTS, 7, 8, 9.

## BOATS AND VESSELS.

1. *District Courts, jurisdiction of—Admiralty—Maritime liens.*—Maritime contracts, in the sense used in admiralty practice, and marine torts, in cases where a maritime lien arises, belong to the exclusive and original jurisdiction of the District Courts of the United States; and therefore those provisions in the statutes of this State which authorize actions *in rem* against vessels by name in such cases, are not sustainable.—*Mitchell v. Steamboat Magnolia*, 67.
2. *Admiralty—Steamboats, equipment of, at home port—Jurisdiction of State courts.*—The furnishing of the material for the equipment and outfit of a steamboat, at her home port, is not a regulation of commerce, nor a maritime contract, but such a contract as it is competent for the States to act upon, and



## BOATS AND VESSELS—(Continued.)

- to create such liens in relation to, as their Legislatures may deem just and expedient.—*Id.*
3. *Mitchell v. Steamboat Magnolia*, ante, p. 67, affirmed.—*Persch v. Steamboat Magnolia*, 69.
4. *Contracts—Boats and vessels—Charter-party—Ownership for the voyage—Owner's lien.*—The owner of a vessel who is also the carrier has a lien upon goods for their transportation, but it does not follow that he who has the title to the property employed in the transportation is necessarily the owner for the voyage. The proprietors of a steamboat or ship, as well as of other property, may lease the same, give up all possession and control, reserving only rent; and in that case the lessee, although the lease assume the form of a charter-party, becomes the owner for the term. The charter-party, instead of a contract of assignment, becomes but a demise; and the temporary owner may carry for others, and they are responsible only to him.—*Adams v. Homeyer*, 545.
5. *Contracts—Boats and vessels—Charter-party, construction of—Possession of vessel.*—The general owner may let his ship with a master and crew of his own choosing, and if there is evidence of intention to part with the possession, it is held to be a demise. But a covenant that he shall have the right to appoint the master to control and navigate, clearly indicates an intention not to trust the property in the hands of others, but to control it by his own agents for the use of the charterers; and he is to be considered as retaining possession.—*Id.*
6. *Contracts—Boats and vessels—Charter-party, terms of, presumed to be known to parties having dealings with the vessel.*—*Semble*, that persons contracting with the charterer of a vessel must be presumed to know the terms of the charter-party.—*Id.*
7. *Boats and vessels—Charter-party—Right of master to freights—Implied contract against consignees who receive goods transported.*—Whatever stipulations may have been made between the consignees of a cargo and the charterer of a vessel which transports them, for the appropriation of the return freights, the right of the master to collect them from the consignees after delivery to them of the goods, at least to the amount due on the charter-party, can not be questioned. The delivering of the goods to the consignees, and their acceptance of them under the bill of lading, raises an assumption against them to pay freights according to the stipulations of the bill of lading. And this implied obligation becomes a positive one when the goods are received with notice that the freights must be paid to the master, and not to the charterer.—*Id.*

## BOND—ADMINISTRATOR'S.

See ADMINISTRATION, 1. LIMITATIONS, 1.

## BOND—APPEAL.

See PRACTICE, CIVIL—APPEAL, 2.

## BOND—INDEMNITY.

See OFFICERS, 1, 2.

## BONDS—MUNICIPAL.

1. *Bonds—Act of March, 1867, authorizing forfeiture of credit, not penal.*—The provision of the act of March 10, 1867 (Sess. Acts 1867, p. 18, § 8),

**BONDS—MUNICIPAL—***(Continued.)*

- authorizing the forfeiture of the credit on non-payment of interest on bonds, is not such a penalty as to bring the bonds within the statute pertaining to penal bonds. (Gen. Stat. 1865, ch. 150.)—*Moore v. City of Jefferson*, 202.
2. *Bonds—Jefferson City—Receipts of interest after suit commenced not a waiver of right to recover face of bond.*—After commencement of suit on Jefferson City bonds (Sess. Acts 1867, p. 18, § 3) for non-payment of interest due thereon, the mere receipt by plaintiff of said interest, without proof of any agreement to discontinue suit or waive the forfeiture, is not a waiver of his right under that statute to recover the whole amount of the bond.—*Id.*
  3. *Bonds, forfeiture of—Agreement to waive, effect of.*—*Semble*, that a contract to waive the forfeiture of a bond, although without consideration, should be held to have the same force as an act which of itself indicated a waiver, when that contract is an inducement to the performance of the conditions the neglect of which has caused the forfeiture.—*Id.*

**C****CAPE GIRARDEAU COURT OF COMMON PLEAS.**

See **COURTS**.

**CARRIERS.**

1. *Carriers, associations of—Joint liability for losses at any point in transit.*—Where carriers on connecting routes form associations and arrangements for the purpose of carrying goods or parcels through the whole line, they are, beyond question, partners, and each is responsible for any loss or injury to goods which may happen, in whatever part of the line it occurs.—*Coates v. U. S. Express Co.*, 238.
2. *Carriers—Express companies—Goods lost in transit beyond their line of transport, who responsible for.*—In a suit against an express company for goods lost in transit beyond its line of conveyance, where the evidence shewed no payment for the whole route, and no understanding, usage, or agreement that the company assumed to be responsible for the goods after they left its own line: *held*, that it was only bound, under its contract or undertaking, to transport them safely to the point on its line nearest the place of destination, and then to deliver them to the proper carrier to be forwarded; and that, having done this, it was not responsible for a subsequent loss.—*Id.*

See **BOATS AND VESSELS**.

**CERTIORARI.**

See **COURTS, COUNTY, 10, 11. PRACTICE, CIVIL—APPEAL, 6.**

**CIRCUIT ATTORNEYS.**

1. *Circuit attorneys—Fees.*—In cases where indictments were found and drawn up during the term of one incumbent of the office of circuit attorney, and he performed all the actual services which were rendered, and the cases were continued and not brought to trial, and no services rendered in them by the next incumbent of that office during his term, the fees accrued belonged to the former.—*Vastine v. Voullaire*, 504.

**COMMON LAW.**

See **DAMAGES, 11.**

## CONSTABLE.

See REPLEVIN, 1.

## CONSTITUTION.

1. *Act as to organizing schools not unconstitutional because to be submitted to popular vote.*—The Legislature can not propose a law and submit it to the people to pass or reject it by a general vote. But chapter 47 of Gen. Stat. 1865, authorizing cities, etc., to organize for school purposes, became valid on its passage; and if the people, by vote, elected not to avail themselves of its privileges, their action did not in the least impair its force. It can not be held unconstitutional merely because it depends for its efficacy on the vote of the people.—State ex rel. Dome v. Wilcox, 458.
2. *Act as to organizing schools, etc., not unconstitutional, as being special in its nature.*—Chapter 47, Gen. Stat. 1865, is not obnoxious to section 27, article 4, or section 4, article 8, of the constitution, as being special in its nature. Special statutes therein referred to are such as relate to individual classes or particular localities. Had the act applied to a certain specified town or a single corporation, it would have been in conflict with those sections. That law is as general as is consistent with its scope and design, and no law more general could be framed to effectuate the object in view.—*Id.*
3. *Act as to organizing schools—Loanng credit by town, for purpose of, constitutional.*—Section 14, article 11, of the State constitution has exclusive reference to municipal corporations becoming stockholders and loaning their credit to private companies, associations, and corporations, and can not be applied to a case where (as under chapter 47, Gen. Stat. 1865) a town loans its credit for public school purposes.—*Id.*
4. *Constitution, section 32, article 4, mandatory.*—Section 32, article 4, of the constitution, which declares that “no law enacted by the general assembly shall relate to more than one subject, and that shall be expressed in the title,” is equally obligatory and mandatory with any other provision thereof; and where a law is clearly and palpably in opposition to it, there is no other alternative but to pronounce it invalid.—State v. Miller, 495.
5. *Act to prevent issue of false receipts, etc., constitutionality of.*—Section 32, article 4, of constitution.—The act entitled “An act to prevent the issue of false receipts or bills of lading, and to punish fraudulent transfers of property by warehousemen, wharfingers, and others,” is sufficiently in conformity with section 32, article 4, of the State constitution. The act shows clearly that its object was to strike at a whole class of cases, and remedy an existing evil; and while warehousemen and wharfingers are enumerated in the title, “others” are spoken of, and the provisions of the act treat of subjects which have a natural connection.—*Id.*

See BANKS AND BANKING, 1, 2. COURTS, COUNTY, 3. OFFICERS, 7.

## CONTRACTS.

1. *Equity—Lands, sale of—Specific performance, discretion of court in enforcing.*—Whether a decree for specific performance shall be awarded in any particular case, is always a matter resting in the sound and reasonable discretion of the court, and it is held to be a reasonable exercise of this power to deny a decree when its allowance would be harsh or oppressive in its operation on either party.—Taylor v. Williams, 80.
2. *Contracts, specific enforcement of—Must be precise, etc.*—Contracts sought

## CONTRACTS—(Continued.)

- to be specifically enforced must not only be proved in a general way, but their terms must be so precise and exact that neither party could reasonably misunderstand them, and those terms must be satisfactorily established by the evidence.—*Id.*
3. *Contract—Assignment—Inducement—Trust and confidence.*—Where a contract may have been founded in personal trust and confidence, the assignee thereof can not recover upon it without the consent of the party contracting with his assignor, to the assignment.—*Lansden v. McCarthy*, 106.
  4. *Sale—Real estate—Deed of trust—Re-sale.*—At a sale of real estate under a deed of trust, when the highest bidder fails to pay the purchase money, the property may be re-sold by the trustee. (44 Mo. 145; 38 Mo. 469.)—*O'Fallon v. Kennerly*, 124.
  5. *Equity—Sale—Specific performance, when granted—Executory contract.*—Equity may decree a specific performance of a contract for the sale of property, notwithstanding a default in payment upon the day specified, and in many cases where there is an express stipulation of forfeiture. But this relief has always been afforded upon equitable principles, and some circumstances must exist to show that the party is justly entitled to it. There is no respectable case, where the contract is wholly executory and the time specific when the purchase money shall be paid, with an express condition of forfeiture if not paid at that time, and where the purchaser has never taken possession or expended anything on the premises, but waits for several years after the payments are due, and until there is a rise in value, in which the purchaser can obtain relief.—*Id.*
  6. *Bonds—Conveyance of real estate—Payment—Forfeiture—Waiver.*—Where a bond is given to convey real estate, conditioned on the payment of certain money at a specified time, even though it contains an express stipulation of forfeiture in case of non-payment, yet if part payment be made and accepted after the time fixed, the forfeiture is waived; and upon tender of the balance, the purchaser has a clear equity, but without such tender he has no equity.—*Id.*
  7. *Contract—Bill of lading, negotiability of.*—In a qualified and restricted sense, a bill of lading has the attribute of negotiability, and may be transferred by indorsement and delivery.—*Davenport National Bank v. Homeyer*, 145.
  8. *Contract—Bill of lading—Delivery without indorsement.*—The delivery of a bill of lading without indorsement, for value, transfers the property in the goods which it covers.—*Id.*
  9. *Contract—Bill of lading attached to draft—Delivery without indorsement.*—A. consigned to B., as his factor, 300 barrels of flour, and drew on him for the amount due. The draft was discounted by a bank on the faith of the bill of lading issued on the flour. The bill was attached to the draft as collateral security, and thus transferred to the bank, but was not indorsed or formally assigned, B. having refused to accept the draft. *Held*, that he was not at liberty to appropriate the flour or its proceeds to his own use. It was the property of the bank, for the purpose of meeting the dishonored draft.—*Id.*
  10. *Land, sale of—Part performance—Escrow—Delivery of deed.*—A. made a verbal contract with B. for the purchase of certain land. Part of the purchase money was paid at the time. The remainder was to be paid in two weeks, when a warrantee deed for the property was to be given. The deed in the

## CONTRACTS—(Continued.)

meantime was deposited with a third party as an escrow. At the time named for completing the contract, A. refused to pay the remainder, and having purchased of C., who held adversely to B., went into possession under him. *Held*, that the facts showed no such part performance as to take the case out of the statute of frauds. Such a deposit of the deed could not be made to operate as a delivery. At law, the statute would be a complete bar to an action to recover the money due, even if the contract were so performed as to make it a fraud to seek to evade it.—*Townsend v. Hawkins*, 286.

11. *Conveyances—Title bond—Purchase, possession taken after—Refusal of deed—Suit for recovery of purchase money.*—When one pays the money and takes possession under a title bond for the conveyance of land, and the vendor, after neglecting for three years to execute the deed, makes tender thereof, the vendee can not reject the deed and sue for the recovery of the purchase money. Time not being of the essence of the contract, and the vendee being in possession, the delay was not such as to furnish ground for rescission of the contract.—*Woodward v. Van Hoy*, 300.
12. *Statute of frauds—Contracts not to be performed in one year, executed by one party, statute can not be invoked by the other.*—The purchaser of a carding machine, by a verbal agreement with the vendor, bound himself not to use any other carding machine in the vicinity of the one sold, for a period of four years. In suit by the vendor for breach of the contract, *held*, that although the contract could not be wholly performed within one year, yet, having been completely executed by the plaintiff, defendant could not interpose the statute of frauds.—*Self v. Cordell*, 345.
13. *Equity—Bill to rescind contract of sale of land—New consideration—Actual abandonment.*—A verbal agreement to rescind a contract under seal for the sale of land, made after payments are due, and founded upon no new consideration, unless followed by an actual abandonment of the sale by both parties and a restoration of the property so far as possible to the vendor, will be treated as invalid in a suit by the vendor for the stipulated purchase money.—*Pratt v. Morrow*, 404.

See BOATS AND VESSELS, 4, 5, 6, 7. BONDS, MUNICIPAL, 1. HUSBAND AND WIFE, 6. INSURANCE, 8. LANDLORD AND TENANT, 1. SALES, 1, 2.

## CONVEYANCES.

1. *Lands and land titles—Confirmation—Assignment—Act of July 4, 1836.*—The board of commissioners, under the act of Congress of July 4, 1836, confirmed a certain lot "to A. or his legal representatives." *Held*, that the party claiming must do so, if not in his own name, at least in his own person, and produce evidence of his title as such legal representative. This being done, the title will inure to his own benefit; and it is not necessary that the confirmation should be made to him by name. (*Connoyer et al. v. Washington University*, 36 Mo. 481.)—*Connoyer v. LaBeaume's Heirs*, 139.
2. *Equity—Devises of lands; of money in lieu of—Election—Conveyance of land pending election—What title conveyed.*—When the testator devises the interest of certain heirs in a specified tract of land to other members of his family, and also devises to said heirs certain moneys as their full share and just proportion of the land, the equity doctrine of election applies; the appearance of the heirs in court and their renunciation of the land is also

## CONVEYANCES—(Continued.)

- an election; and the attempted conveyance by them and its acceptance by the purchaser during suit in partition of the land, and while the election is being made, especially when the purchaser acted as a sort of attorney for them, and drew and swore them to their answer in that suit, is a gross and naked fraud attempted to be perpetrated upon the other heirs of the testator, a contempt of the court in which the proceedings are pending, and possesses no validity whatever.—*O'Reilly v. Nicholson*, 160.
3. *Lis pendens*—*Deed void*.—The deed of a party *pendente lite* is void, and even an innocent purchaser would take nothing by his deed, and could convey nothing; and a purchaser *pendente lite* is bound by the decree that may be made against the person from whom he derives title.—*Id.*
  4. *Terms "fee," "fee simple," "fee simple absolute," meaning of*.—In modern estates the several terms "fee," "fee simple," and "fee simple absolute," are substantially synonymous.—*Jecko, Trustee of Hume, v. Taussig*, 167.
  5. *Conveyances—Fee simple—To married woman—Authority of to convey, with remainder, over to heirs, etc.*—Certain land was conveyed to a married woman and her trustee, "to be sold and conveyed in fee, mortgaged, or rented," as she might, in writing, direct. The deed further provided that, in case of her death before her husband's, the estate might vest in her surviving children. *Held*, that her authority to convey was absolute and unlimited, and that the latter provision did not affect her power of alienation during the life of her husband: *semble*, that equity will enforce specific performance of a contract to purchase an estate so conveyed upon tender of deed to the purchaser.—*Id.*
  6. *Deeds—Delivery of with intent to invest title, effect of*.—A deed delivered by the grantor, with the intent and purpose of vesting the title in the grantee, amounts to a substantial transfer of the estate, and no subsequent act can defeat it.—*Parsons v. Parsons*, 263.
  7. *Land, sale of—Part performance—Escrow—Delivery of deed*.—A. made a verbal contract with B. for the purchase of certain land. Part of the purchase money was paid at the time. The remainder was to be paid in two weeks, when a warrantee deed for the property was to be given. The deed, in the meantime, was deposited with a third party as an escrow. At the time named for completing the contract, A. refused to pay the remainder, and having purchased of C., who held adversely to B., went into possession under him. *Held*, that the facts showed no such part performance as to take the case out of the statute of frauds. Such a deposit of the deed could not be made to operate as a delivery. At law, the statute would be a complete bar to an action to recover the money due, even if the contract were so performed as to make it a fraud to seek to evade it.—*Townsend v. Hawkins*, 286.
  8. *Conveyances—Title bond—Purchase, possession taken after—Refusal of deed—Suit for recovery of purchase money*.—When one pays the money and takes possession under a title bond for the conveyance of land, and the vendor, after neglecting for three years to execute the deed, makes tender thereof, the vendee can not reject the deed and sue for the recovery of the purchase money. Time not being of the essence of the contract, and the vendee being in possession, the delay was not such as to furnish ground for rescission of the contract.—*Woodward v. Van Hoy*, 300.
  9. *Deeds—Misdescription—Meaning of word "on."*—A deed described cer-



## CONVEYANCES—(Continued.)

tain land as lying "on the Louisville and Nashville railroad," without giving the description of it by boundaries. In suit to set aside the conveyance as bad for misdescription, the proof showed that the land was near to, but not bordering upon, the road. *Held*, that the word "on," as denoting contiguity or neighborhood, may mean as well "near to," as "at;" and in this sense the land was not misdescribed.—*Burnam v. Banks*, 319.

10. *Equity—Sheriff's sale—Misdescription—Purchase—Action for recovery of purchase money—Caveat emptor.*—A. owned certain described land in the north-west quarter of section thirty-five, township sixty, range thirty-six. Under execution against him, the sheriff, by mistake, sold and deeded to B. a tract similarly described in the north-east quarter of section twenty-five of the same township and range, to which A. had no title. The purchase money was paid, and went to extinguish the judgment against A. Supposing the land to be his, A. surrendered it to B., who moved on it and made improvements. Afterwards, discovering the misdescription, A. regained possession, claimed the land, and refused to refund the purchase money. *Held*, that the doctrine *caveat emptor* had no application to such a case; that the consideration for the money paid on execution had failed, B. having no title to the land, and that an action for the recovery of the money so paid was properly maintainable.—*McLean v. Martin*, 393.

11. *Sheriff, sale by—Mistake as to date of, in return and recitals of deed.*—Land was advertised by the sheriff to be sold, and was in fact sold, on the 5th day of January. But the sheriff's return, and his recitals in the deed to the purchaser, declared the sale to have been on the "4th" of January. *Held*, 1st, that the mistake in the return as to the day of sale was not material, for the reason that it was not necessary to the validity of the purchase that the sheriff should make a correct return, or any return at all; and 2d, that the mistake as to the exact day of sale, occurring in the deed, was also immaterial, provided that the deed on its face was according to law, showing a sale at an authorized day during term of court.—*Buchanan v. Tracy*, 437.

12. *Conveyances, voluntary—Nothing presumed in favor of without change of possession.*—Courts can not presume anything in favor of a gift of land, although upon family considerations, further than it is followed by actual and unequivocal possession and improvements.—*Wiemer v. Stephani*, 565.

See CONTRACTS, 1, 2, 6, 13. DAMAGES. 19. EVIDENCE, 6. LANDS AND LAND TITLES, 1, 2.

## COPARCENER.

See HUSBAND AND WIFE, 2, 3.

## CORPORATIONS.

1. *Facts preliminary to order of County Court—Corporations—Towns, establishment of.*—In alleging the existence of a town created under chapter 41, Gen. Stat. 1865, it is not necessary to set out the existence of the facts on which the order of the County Court establishing the corporate existence of the town was founded. The court had jurisdiction of the subject, and the propriety and regularity of its action is to be presumed until the contrary appears.—*State ex rel. Read v. Weatherby*, 17.
2. *Quo warranto—Towns and townships—County Court, order of—Fraud.*—In *quo warranto* proceedings against persons for usurping the franchise of

## CORPORATIONS—(Continued.)

trustees of a town, under pretense that the inhabitants were a body corporate, under chapter 41, Gen. Stat. 1865, the only question to be determined is the legal existence or non-existence of the corporation. And where the order of the County Court establishing the town corporation is shown by the answer to be unobjectionable, a replication charging that the granting order was fraudulently procured by the applicants, is *dehors* the record and improper.—*Id.*

3. *Damages—Corporation liable for acts of agents, in what degree.*—Corporations, whether municipal or aggregate, are now held to the same liability as individuals; and if an agent or a servant of a corporation, in the line of his employment, shall be guilty of negligence or commit a wrong, the corporation is responsible in damages.—*Hilsdorf v. City of St. Louis*, 94.
4. *St. Louis, city of—Deposit of carcasses—Mayor.*—The city of St. Louis is not liable to the owner of property for damages caused by the deposit of dead mules on his premises, under an arrangement with the mayor. His action in such case was outside of his official duties, and could not bind the city.—*Id.*
5. *St. Louis, city of—Removal of carcasses—Power of city over acts of contractors.*—The city of St. Louis had no power to control the action of persons employed under article IX of ordinance 4894, for the removal of dead animals, under their contract; and having no such power, they could not be responsible for such action.—*Id.*
6. *St. Louis, city of—Removal of carcasses—Responsibility of owner for.*—The fact that the city of St. Louis has made a contract for the removal of dead animals does not exonerate the owner from any responsibility in regard to them, when that contract can not be or is not complied with; nor can the obligation he is under to let the contractor have the carcass if he does not himself appropriate it within twelve hours, if the contractor shall come for it, be construed to discharge all responsibility on his part.—*Id.*
7. *Insurance companies—Motion for judgment against stockholders—President, purchase of judgments by.*—In case of motion against the president of an insolvent insurance company, as stockholder therein, for the amount of an unsatisfied judgment against the company, he will not be allowed to offset the face of a judgment against the company, purchased by him while president, on speculation, but only the sum actually paid by him for the same. In such case the company's interests and his were identical. Public policy and morality alike forbid the chief managing officer of a company in such a manner to speculate for his private gain.—*Lingle v. National Insurance Co.*, 109.
8. *Corporations—Railroads—Subscriptions to, vote upon—Definite amount of stock must be voted for.*—The law authorizing the Saline County Court to subscribe stock in the Lexington and St. Louis Railroad Company, expressly provided that the subscription should not be made unless a majority of the tax-payers should vote for it, "specifying the amount." The order of the County Court submitting the question to the people called on them to vote for or against an amount "not exceeding \$70,000," leaving the precise amount undetermined. The entry in the records of the County Court, subsequent to the vote, declared that the election resulted "in favor of levying a tax of \$70,000, to subscribe the same to the capital stock of the Lexington and St. Louis Railroad." In *mandamus* against the court to compel the issue of

## CORPORATIONS—(Continued.)

the bonds, and levy of tax for their payment: *Held*, that such entry was not a conclusive finding of the court of the fact that the tax-payers voted to subscribe the specific sum of \$70,000, but that, under a fair interpretation of the record, it showed merely that the question submitted had received a majority of the votes. The bonds of a county can be made valid only by a substantial compliance with the law that authorizes their issue; and the failure of voters to specify their amount, in the case at bar, rendered bonds issued in pursuance of such vote invalid.—*State ex rel. Lexington and St. Louis R.R. Co. v. Saline County Court*, 242.

9. *Corporations, attorneys at law may be employed by, without resolutions of the board of directors.*—Managing officers of corporations have power to employ attorneys and counselors without formal resolutions to that effect from their boards of directors.—*Western Bank v. Gilstrap*, 419.
10. *Corporation—Sale of stock in, under execution, gives purchaser what title.*—A sale of shares of stock of an incorporated company, under execution, will not vest the title thereto in the purchaser if the defendant in the execution had none; nor will he acquire any greater or other rights than the seller had.—*Mechanics' Bank v. Merchants' Bank*, 513.
11. *Corporation—Shares of stock—Transfer of indebtedness to bank.*—The by-law of a bank forbidding the transfer of stock where the owner was indebted to the bank, is valid, although inconsistent with the general law of the State governing the transfer of property; and in case of the sale under execution of shares of stock, the purchaser can not recover the shares, in an action of trover against the bank, till such indebtedness be satisfied.—*Id.*

See DAMAGES, 22, 23, 24, 25. INSURANCE, 1, 2. RAILROADS.

## COSTS.

See PRACTICE, CRIMINAL, 2, 3.

## COURTS, CAPE GIRARDEAU COMMON PLEAS.

See MANDAMUS, 1.

## COURTS, CIRCUIT.

See COURTS, COUNTY, 8. COURTS, ST. LOUIS CIRCUIT. ROADS, COUNTY, 2.

## COURTS, COUNTY.

1. *Facts preliminary to order of County Court—Corporations—Towns, establishment of.*—In alleging the existence of a town created under chapter 41, Gen. Stat. 1865, it is not necessary to set out the existence of the facts on which the order of the County Court establishing the corporate existence of the town was founded. The court had jurisdiction of the subject, and the propriety and regularity of its action is to be presumed until the contrary appears.—*State ex rel. Read v. Weatherby*, 17.
2. *Quo warranto—Towns and townships—County Court, order of—Fraud.*—In *quo warranto* proceedings against persons for usurping the franchise of trustees of a town, under pretense that the inhabitants were a body corporate, under chapter 41, Gen. Stat. 1865, the only question to be determined is the legal existence or non-existence of the corporation. And where the order of the County Court establishing the town corporation is shown by the answer to be unobjectionable, a replication charging that the granting order was fraudulently procured by the applicants, is *dehors* the record and improper.—*Id.*

## COURTS, COUNTY—(Continued.)

3. *Towns—Chapter 41, Gen. Stat. 1865, constitutional.*—Chapter 41, Gen. Stat. 1865, concerning towns, etc., is constitutional. (Kayser v. Bremer, 16 Mo. 88.)—*Id.*
4. *Election—St. Louis County Court—Term of office of judge appointed to fill vacancy—Construction of statute.*—Under section 2 of the amendatory act concerning St. Louis county (Adj. Sess. Acts 1863-4, p. 279), the term of office of a judge appointed to fill a vacancy in the St. Louis County Court, continued only until the next general election, and not till the next regular election of county judge, as contemplated by the act of January 6, 1860 (Sess. Acts 1859-60, p. 524, § 12).—State ex rel. Attorney-General v. Conrades, 45.
5. *Courts, County, allowance of claim by—In what case not res adjudicata.*—The action of a County Court in allowing a claim of the county collector against the county, through a mistake of fact, is not *res adjudicata*, so as to bar a suit by the county to recover back the amount allowed. In such case the judges of the court acted merely as the fiscal agents of the county, and their mistake might be inquired into and corrected, as well as those of an individual acting in his own behalf.—County of Marion v. Phillips, 75.
6. *Corporations—Railroads—Subscriptions to, vote upon—Definite amount of stock must be voted for.*—The law authorizing the Saline County Court to subscribe stock in the Lexington and St. Louis Railroad Company, expressly provided that the subscription should not be made unless a majority of the tax-payers should vote for it, "specifying the amount." The order of the County Court submitting the question to the people, called on them to vote for or against an amount "not exceeding \$70,000," leaving the precise amount undetermined. The entry in the records of the County Court, subsequent to the vote, declared that the election resulted "in favor of levying a tax of \$70,000, to subscribe the same to the capital stock of the Lexington and St. Louis Railroad." In *mandamus* against the court to compel the issue of the bonds, and levy of tax for their payment: *Held*, that such entry was not a conclusive finding of the court of the fact that the tax-payers voted to subscribe the specific sum of \$70,000, but that, under a fair interpretation of the record, it showed merely that the question submitted had received a majority of the votes. The bonds of a county can be made valid only by a substantial compliance with the law that authorizes their issue; and the failure of voters to specify their amount, in the case at bar, rendered bonds issued in pursuance of such vote invalid.—State ex rel. Lexington and St. Louis R.R. Co. v. Saline County Court, 242.
7. *Revenue—School taxes—Delinquent land list—Warrant for, made out on the county treasury.*—Under the act of 1868, concerning schools (Wagn. Stat. pp. 1246-7, §§ 18-20), the justices of a County Court are bound to issue to the township clerk, on demand, for the use of the schools, a warrant on the county treasury for the amount of the delinquent list of land taxes due the sub-school districts, without waiting until they are collected and paid into the county treasury.—Wallendorf v. The County Court of Cole County, 228.
8. *County Court, acting judicially, not subject to the control of the Circuit Court—Mandamus—Prohibition, at whose instance will lie.*—It is the settled doctrine that where the County Court acts judicially, as on its disapproval of an administrator's sale, the Circuit Court can not control its judgment. And in case of *mandamus* from the Circuit Court to compel the

## COURTS, COUNTY—(Continued.)

County Court to approve such sale, a writ of prohibition against the former will properly lie, for the reason that, although the Circuit, by its process, obtained jurisdiction of the party, it acquired none over the subject-matter of the action of the County Court; and the writ of prohibition may issue against it at the instance of any one of the parties, or even of a stranger.—*Trainer v Porter*, 336.

9. *County Court—Johnson county—Judges—Term of office—Allotment—Construction of statute.*—Under the act of March 19, 1866 (Sess. Acts 1865-6, p. 82, § 1), A. was, in 1866, elected one of two justices of the County Court of Johnson, and by allotment under section 3, chapter 137, Gen. Stat. 1865, his term of office was fixed at two years. But, *held*, that the provision of the section last named, in regard to allotment, applied only to County Courts composed of three persons, and that, under section 2 of the same chapter, his term of office continued for six years.—*State ex rel. Attorney-General v. Windsor*, 346.
10. *Courts, County—Appellate jurisdiction—Certiorari, etc.*—When appeals from the judgments or orders of County Courts are not expressly provided for by statute, resort must be had to writs of error, *certiorari*, etc., to obtain appellate jurisdiction.—*Snoddy v. Pettis County*, 361.
11. *Courts, County—Appeals—Orders—Final judgment necessary to secure appeal.*—On an appeal from the order of a County Court to a Circuit Court, there should be a judgment of affirmance or reversal thereon, to entitle parties to further appeal.—*Id.*

See *ROADS, COUNTY*, 2.

## COURT OF CRIMINAL CORRECTION.

See *PRACTICE, CRIMINAL*, 9.

## COURTS, DISTRICT.

See *JURISDICTION*, 1, 2. *PRACTICE, CIVIL—APPEAL*, 2.

## COURTS, JUSTICES'.

See *JUSTICES' COURTS*.

## COURT, KANSAS CITY COMMON PLEAS.

1. *Courts, inferior and local—Mechanics' liens—Situation of property, averment of petition as to.*—The Kansas City Court of Common Pleas was an inferior and local court. Under the act of March 2, 1859 (Sess. Acts 1858-9, p. 353, § 5), it had "concurrent jurisdiction with the Circuit Court to enforce mechanics' or other liens in Kaw township." In a suit in that court on a mechanics' lien sought to be enforced against certain property in Kaw township, *held*, that the petition, not averring that the property was situated in that township, was fatally defective. Where the judgments of local courts and courts of inferior jurisdiction are called in question, the record should show affirmatively all the facts necessary to give them jurisdiction, both of the subject-matter of the suit and of the parties to it.—*Schell v. Leland*, 289.

## COURTS, ST. LOUIS CIRCUIT.

1. *Circuit Court of St. Louis county—Judges, duties of—Practice, civil—Motion for a new trial.*—There is no substantial difference between the duties of the several judges of the St. Louis Circuit Court at special term and those of the Circuit Courts of the State. The court, at general term, may distribute business among the several judges; but when one enters upon a trial, he is



COURTS, ST. LOUIS CIRCUIT—(*Continued.*)

independent of the control of the other judges, except in review of his acts, and has the same power at special term to vacate and modify its judgments, decrees, or orders, rendered or made at such term, as if said court was constituted with a single judge. It is the duty of the judge who tries a case to go through with it, and hear a motion for a new trial if made; and he can not refuse to hear such motion, or transfer the case and motion to any one of his colleagues for final disposition.—*Voullaire v. Voullaire*, 602.

## COURTS, SESSIONS OF.

See JUSTICES' COURTS, 2.

## COURTS, SUPREME.

See PRACTICE, CIVIL—APPEAL.

## COURTS, UNITED STATES.

See JURISDICTION, 1, 2.

## CRIMES AND PUNISHMENTS.

See PRACTICE, CRIMINAL.

## D

## DAMAGES.

1. *Damages—Railroad companies—Cow, killing of—Petition—Allegation of negligence, sufficiency of.*—In a suit for damages against a railroad company for killing a cow, the allegation that the act was done carelessly and negligently was sufficient, and showed a good cause of action.—*McPheeters v. Hann. and St. Jo. R.R. Co.*, 22.
2. *Damages—Railroad companies—Injuries—Towns—Public crossings.*—Where an injury, caused by a railroad train, occurred at a public crossing in the streets of a town, no recovery could be had without proof of actual negligence.—*Id.*
3. *Damages—Negligence—Jury.*—The question of negligence is peculiarly and exclusively for the jury to determine.—*Id.*
4. *Damages—Railroad companies—Negligence—Cattle inclosures.*—The doctrine that the owner of cattle is obliged to keep them on his own premises, and that if they stray therefrom they are trespassers, and the owner is guilty of negligence, has never been the law of this State. (*Gorman v. Pacific R.R. Co.*, 26 Mo. 441.)—*Id.*
5. *Damages—Negligence, gross negligence, meaning of terms.*—*Semble*, that in law there is no difference between negligence and gross negligence, the latter being nothing more than the former, with the addition of a vituperative epithet.—*Id.*
6. *Damages, measure of—Actions for—Care and diligence to be exercised by defendant.*—It is the established doctrine of the Supreme Court that, in an action for damages on account of negligence or unskillfulness, it should be left to the jury to say whether, notwithstanding the imprudence or neglect of the injured person, the defendant could not, in the exercise of reasonable care and diligence, have prevented the injury.—*O'Flaherty v. Union Railway Co.*, 70.
7. *Damages—Negligence—Care and prudence to be exercised by infants.*—The same rigid rule in determining what would be a bar to an action on the



## DAMAGES—(Continued.)

ground of contributory negligence, would not be applied to an infant, an idiot, or an insane person, as to one who had arrived at an age to possess ordinary judgment and discretion. All that is necessary to give a right of action for an injury inflicted is that the injured person shall have exercised care and prudence equal to his capacity.—*Id.*

8. *Damages — Prudence to be exercised by parents.*—To constitute negligence in parents, there must be an omission of such care as persons of ordinary prudence exercise and deem adequate in the care of children.—*Id.*
9. *Damages — Corporation liable for acts of agent, in what degree.*—Corporations, whether municipal or aggregate, are now held to the same liability as individuals; and if an agent or servant of a corporation, in the line of his employment, shall be guilty of negligence or commit a wrong, the corporation is responsible in damages.—*Hilsdorf v. City of St. Louis*, 94.
10. *Damages, exemplary — When given.*—In an action for damages for a trespass, where the act is aggravated, and where there has been fraud, oppression, malice, or gross negligence, the jury is allowed to award exemplary damages, not only to compensate the sufferer, but also to punish the offender. But in the absence of proof showing malice or willfulness, or other circumstances of aggravation, the damages should be compensatory merely.—*Franz v. Hilterbrand*, 121.
11. *Damages — Trespass — Fence, sufficiency of.*—The fence inclosing the land of A. was built within the boundary line of the land of B. In trespass for damages done to A.'s crop by cattle of B.: *held*, that the land was inclosed as required by law (Gen. Stat. 1865, ch. 80, §§ 1, 2) as a condition to recovery. If the fence was of the required character and dimensions, and was treated and used as a partition fence, that was sufficient, without regard to its ownership.—*Moore v. White*, 206.
12. *Damages — Trespass — Fence — Proof — Common and statute law.*—In an action of trespass for breaking through plaintiff's fence, he may sue for single damages at common law. He must comply with the statute (Gen. Stat. 1865, ch. 80) by showing, as a condition to his right of recovery, that his field was inclosed by such a fence as the law defines. But the mode of proof is not modified or affected by the statute.—*Id.*
13. *Damages — Railroads — Accident policies — General accident tickets — Vexatious delay.*—An engineer killed on a railroad locomotive had previously purchased a ticket issued by the Railway Passenger Assurance Company, which, by its terms, insured against death "caused by accident while traveling by public or private conveyance provided for the transportation of passengers." Suit being brought by his legal representatives on the policy, the proof showed that defendant was selling two classes of tickets, one known as the "travelers' risk," the other as the "general accident;" the latter being sold for the highest price; that deceased purchased the latter; that at the time of the purchase defendant's agent knew him to be an engineer, and had no instructions not to sell to railroad employees. *Held*, that deceased was insured against all accidents, without regard to the capacity in which he was acting; that the ticket was intended to cover the accident by which he met his death; and that defendant was liable. *Held, also*, that it was the duty of defendant to pay upon notification of the death of deceased, and,

## DAMAGES—(Continued.)

on its refusal to comply, interest was thenceforth payable.—*Brown v. R. W. Passengers' Assurance Co.*, 221.

14. *Insurance companies—Vexatious refusal, etc.—Damages determined by the jury.*—In actions against insurance companies under Gen. Stat. 1865, ch. 90, § 1, the whole question of vexatious refusal or delay in payment is to be determined by the jury. But before damages are allowed it need not be explicitly proved by plaintiff that the delay or refusal was vexatious. If, upon a full consideration of all the facts and circumstances, they conclude that the refusal was unjustifiable and vexatious, the law authorizes them to assess the damages.—*Id.*
15. *Damages—Railroad companies—Negligence a question of fact for the jury.*—In a suit by the legal representatives of A. against a railroad company for damages caused by his death, the question whether the facts constituted such negligence as to render the company responsible was exclusively for the jury to determine.—*Kennayde v. Pacific R.R.*, 255.
16. *Railroads—Damages—Negligence of deceased must be the proximate cause of his death.*—It is incumbent upon railroad companies to exercise care and diligence; and unless the acts of a person killed by cars were the direct and proximate cause of the disaster, the company will not be excused from liability.—*Id.*
17. *Railroad companies must sound bell in passing through cities.*—Under the statute (Wagn. Stat. p. 310, § 38), it is the imperative duty of railroad companies to sound the bell, and not merely the whistle of the locomotive, in passing through cities.—*Id.*
18. *Railroads—Damages—Negligence—What care in the company may be presumed.*—The citizen who, on a public highway, approaches a railroad track, and can neither see nor hear any indication of a moving train, is not chargeable with negligence for assuming that there is no car sufficiently near to make the crossing dangerous. He had a right to presume that in handling their cars the railroad companies will act with appropriate care, and that the usual signals of approach will be seasonably given, and that the managers of the trains will be attentive and vigilant.—*Id.*
19. *Damages—Sale of land—Easement—Right of way—Clause of deed in restraint of alienation, etc.*—A. sold B. a certain tract of land lying within his own, but communicating with a public highway through a gate in the fence inclosing the land of A. The deed of purchase declared that the fence was "not to be disturbed without the permission" of A. A mere verbal statement by A. to B. of an intention to open a street from the land sold to the highway, without proof of any inducement to such statement, would not render A. liable to B. in damages for failure to open the street. The clause in the deed was in no way a restraint of alienation, and was a valid provision.—*McClanahan v. Schricker*, 280.
20. *Railroads—Damages—Burning fences, etc.—Negligence may be inferred, when—Contributory negligence will not excuse defendant, when.*—In an action against a railroad company for setting fire to plaintiff's fences, corn fields, etc., by sparks from its locomotive, *held* as follows:

First. The jury, in order to charge the company, must find affirmatively that the fire escaped from the smoke-stack through the negligence of its agents or servants. But when it is found that fire has been scattered by the engine

**DAMAGES—(Continued.)**

along its track, with no explanation of the cause, the jury is warranted in inferring some negligence in the company. To rebut that inference, defendant should show that the best machinery and contrivances were used in the particular case at bar to prevent the fire, and that competent servants were employed.

Second. If the conduct of defendant's agents was the immediate and direct cause of the injury, and if, with the exercise of prudence and the use of proper appliances on their part, the result might have been prevented, the defendant would not be excused, even though the proof showed some remote negligence in the plaintiff, as that he carelessly left grass in the fence corners adjacent to the road, whereby the fire was kindled. Such carelessness was not the proximate cause of the loss, and was not such contributory negligence as would excuse defendant.—*Fitch v. Pacific R.R.*, 322.

21. *Practice, civil—Damages—Willful negligence, allegation of—Instructions.*—In a suit for damages by reason of injuries done to a mill, which were alleged to have resulted from defendant's willful negligence, the allegation of "willful" negligence in the pleading was wholly immaterial, and might have been stricken out as surplusage; and an instruction that required, as a condition to plaintiff's recovering, that the jury should find the actions or omissions complained of to have been in any sense "willful," was misleading, and proper ground for reversing the cause on appeal.—*Taylor v. Holman*, 371.
22. *Damages—Defect in street—Previous knowledge of on part of person injured, a fact to be submitted to the jury.*—The fact that a person injured by a defect in a highway or street had previous knowledge of the defect, is not conclusive evidence of negligence on his part. It is a fact to be submitted, with other evidence, to the jury; and in an action to recover damages for an injury caused by such defect, it is only necessary for plaintiff to show that he exercised ordinary care to avoid the accident.—*Smith v. City of St. Joseph*, 449.
23. *Damages—Negligence—Corporations liable for injuries happening by reason of.*—Municipal corporations are bound to keep the streets and highways in a proper state of repair, free from obstructions, so that they will be reasonably safe for travel; and if they fail to do this, they will be held liable for all injuries happening by reason of their negligence.—*Id.*
24. *Damages—Railroad companies—Accident in town limits—Uninclosed fields—Suspended and dissolved corporations.*—In an action against a railroad company for the killing of a cow on its track, where the proof showed that the accident occurred within the limits of a town corporation, as shown by the paper plat of the town, but in fact away from any street, and in an open prairie, and in a case where the town corporation had been dissolved or suspended, the railroad company would be responsible, under the act of 1855 (*Wagn. Stat.* 310-11, § 43), for actual damages arising from failure to fence its track at the point of the accident, without proof of other negligence. The same action might also be brought under section 5, p. 520, *Wagn. Stat.*—*Iba v. Hann. and St. Jo. R.R. Co.*, 469.
25. *Corporations aggregate liable for misfeasance or neglect at common law, although liable to penal action under statute for same offense.*—Corporations aggregate are, in general, liable for misfeasance and non-feasance, whether that liability be expressly provided for or not. And where the statute creates

**DAMAGES—(Continued.)**

a special duty on its part—such as the fencing of unclosed prairie land, etc., by railroad companies—for the neglect of which a common-law action would lie, that action is not forbidden by the fact merely that an extraordinary liability in the nature of a penalty is also provided by the statute (Wagn. Stat. 310-11, § 43). The latter remedy is only cumulative.—*Id.*

26. *Justice's court—Jurisdiction—Venue must appear in transcript.*—In actions for injuries to cattle, etc., the justice's jurisdiction is confined to such as arise within their respective township; and when the transcript fails to show that the injury happened in the township where the justice held his court, the appeal must be dismissed.—*Id.*

See EJECTMENT, 1. EMINENT DOMAIN, 1, 2. JUSTICES' COURTS, 8. PRACTICE, CIVIL—APPEALS, 14, 15, 17. PARTIES, 2. PLEADINGS, 5. TRIALS, 16. ROADS, COUNTY, 2.

**"DECLARATION AND TESTIMONY."**

See PRESBYTERIAN CHURCH.

**DEMAND.**

See BILLS AND NOTES.

**DEPOSITIONS.**

See EVIDENCE, 3.

**DILIGENCE.**

See EQUITY, 10.

**DISTRESS WARRANT.**

1. *Distress warrant—Execution—Sale and deed under.*—Where the State auditor issued a distress warrant (R. C. 1855, p. 1542, § 3 *et seq.*; Wagn. Stat. 1335, § 18 *et seq.*) against a county sheriff for default in payment of public money, and on failure to collect the amount thereof, levy was made on the land of the securities on his official bond, the authority of the sheriff to convey the property to the purchaser will not be presumed from the mere recitals in the conveyance itself. The execution of the bond, the default of defendant, the issue of the warrant, the failure to collect the amount from the principal obligor, must be shown *aliunde*. In the absence of a provision similar to that touching the title vested in the grantee in case of tax sales (Wagn. Stat. 1204, §§ 111-12), such recitals in a sheriff's deed, under a distress warrant, are not even *prima facie* evidence of the regularity of the previous proceedings.—Cook v. Hacklemann, 317.
2. *Executions—Judicial sales—Executions under distress warrant.*—The act touching judicial sales (R. C. 1855, p. 748, § 56; Wagn. Stat. 612, § 54) has no application to a sale under an auditor's distress warrant.—*Id.*

**DOWER.**

1. *Dower—Act of 1855 touching partition—Death of husband after judgment and before sale.*—Under the act of 1855, touching partition (R. C. 1855, ch. 119), the judgment of sale was the final action of the court, and the wife of a coparcener, becoming a widow after judgment and before the sale, can not be made a party and have her interest ascertained by the court. She must look to the sheriff for her portion of the proceeds of the sale.—Hinds v. Stevens, 209.

See HUSBAND AND WIFE.

## E

## EASEMENT.

See DAMAGES, 19.

## ECCLESIASTICAL LAW.

See PRESBYTERIAN CHURCH.

## EJECTMENT.

1. *Ejectment—Occupation by plaintiff's permission, effect of—Damages—Improvements.*—If the evidence in an ejectment suit showed that defendant occupied plaintiff's land by his license, the former would not be liable to the same measure of damages or be deprived of the benefit of his improvements, as he would had his possession been wrongful.—*Thomas v. Babb*, 384.
2. *Ejectment—Proof of sheriff's deed proper under general issue.*—In a suit in ejectment, the deed of a sheriff conveying the property in controversy to defendant, under a judicial sale, is admissible in evidence as well under the general issue, as showing a defect of title in the plaintiff, as under special averments.—*Brown v. Brown*, 412.
3. *Ejectment—Title from common source—Title by defendant at sale under judgment against plaintiff—Prima facie case for plaintiff—Rebutted, how.*—It is an established principle that in ejectment suits, where both litigants claim title through the same third party it is sufficient for the plaintiff to deduce title from the common source; and when defendant claims through purchase at sheriff's sale of the property, under judgment of another against plaintiff, he thereby admits the validity of plaintiff's title up to the date of the sale, and concedes a *prima facie* case to plaintiff; and the burden of proof devolves upon him to overcome it by showing that plaintiff's title has vested in himself, or come to a determination in some other way.—*Id.*
4. *Ejectment—Sheriff's deed of plaintiff's property may be shown under general issue.*—In an action in ejectment, defendant may, under the general issue, show title in himself to the property by proof of judgment and execution against plaintiff, and purchase of the property in controversy by himself at sheriff's sale.—*Meyers v. Gale*, 416.
5. *Equity—Legal estate and possession in defendant as trustee of plaintiff—Ejectment, improper—Suit should be brought in equity.*—When the legal title and the right of possession of a portion of certain land were in defendant, as the trustee of plaintiff, and nothing showed any actual ouster or disseizin by defendant, plaintiff could not sue in ejectment, but should resort to a suit in equity for partition, subject to the terms of the deed of trust.—*Reed v. Robertson*, 580.

See RAILROADS, 4.

## ELECTIONS.

1. *Election—St. Louis County Court—Term of office of judge appointed to fill vacancy—Construction of statute.*—Under section 2 of the amendatory act concerning St. Louis county (Adj. Sess. Acts 1863-4, p. 279), the term of office of a judge appointed to fill a vacancy in the St. Louis County Court, continued only until the next general election, and not till the next regular election of county judge, as contemplated by the act of January 6, 1860. (Sess. Acts 1859-60, p. 524, § 12.)—*State v. Conrades*, 45.



## ELECTIONS—(Continued.)

2. *Elections—Terms “regular” and “general,” meaning of.*—When applied to elections, the terms “regular” and “general” are used interchangeably and synonymously.—*Id.*
3. *Elections—Appeal—Act of 1867, construction of.*—The manifest intention of the act of 1867 (Wagn. Stat. 578, §§ 92-3), providing for appeals in contested election cases, was to allow a trial *de novo* in the Circuit Court.—*Boggs v. Brooks*, 232.
4. *Election—Contest—Count of votes, final—Term of notice—Mode of contest in certain case by quo warranto.*—Within eight days after an election, the county clerk, under the statute touching elections (Wagn. Stat. 569, § 25), proceeded to cast up the votes, and gave a certificate of election to A. Afterward, B. giving notice that he would contest the election, he made a second count and gave a certificate to B. Within twenty days after the second count, but more than twenty days after the first, A. also gave notice that he would contest the election. *Held*, 1st, that the duty of the clerk was simply ministerial, and when finished was wholly performed, and that the second count of votes and award of certificates was invalid and null; *a fortiori*, if made after the eight days had expired, and the matter had been removed by notice of contest to the Circuit Court; 2d, that the requirements of the statute concerning twenty days' notice (Wagn. Stat. 573, § 52) was imperative, and that the notice was insufficient, not having been given within twenty days from the first count; 3d, that the proper remedy in such case is by *quo warranto* in the Circuit Court.—*Bowen v. Hixon*, 340.

## EMINENT DOMAIN.

1. *Eminent domain—Land taken for railroads—Damages, assessment of.—Construction of statute.*—Under the act for the appropriation and valuation of land taken for telegraph and other purposes (Wagn. Stat. 327-8, §§ 3, 4), unless the court is clearly satisfied that the commissioners appointed to assess damages have erred in the principles upon which they have made their appraisals, their report should not be disturbed by review or a new appraisement.—*St. Louis and St. Joseph Co. R.R. v. Richardson*, 466.
2. *Eminent domain—Land taken for railroads—Benefits, assessment of, how estimated.*—The settled law of this State is that in assessment of damages for land taken for railroad purposes (Wagn. Stat. 327-8, §§ 3, 4) the benefit derived which is to be taken into account is the direct and peculiar benefit resulting to the land in particular—not the general benefit accruing to it in common with other land which is enhanced in value by the building of the road.—*Id.*

## EQUITY.

1. *Equity—Lands, sale of—Specific performance, discretion of court in enforcing.*—Whether a decree for specific performance shall be awarded in any particular case, is always a matter resting in the sound and reasonable discretion of the court; and it is held to be a reasonable exercise of this power to deny a decree when its allowance would be harsh or oppressive in its operation on either party.—*Taylor v. Williams*, 80.
2. *Contracts, specific enforcement of—Must be precise, etc.*—Contracts sought to be specifically enforced must not only be proved in a general way, but their terms must be so precise and exact that neither party could reasonably mis-



## EQUITY—(Continued.)

understand them, and those terms must be satisfactorily established by the evidence.—*Id.*

3. *Sale—Real estate—Deed of trust—Re-sale.*—At a sale of real estate under a deed of trust, when the highest bidder fails to pay the purchase money, the property may be re-sold by the trustee. (44 Mo. 145; 38 Mo. 469.)—*O'Fallon v. Kennerly*, 124.
4. *Equity—Sale—Specific performance, when granted—Executory contract.*—Equity may decree a specific performance of a contract for the sale of property, notwithstanding a default in payment upon the day specified, and in many cases where there is an express stipulation of forfeiture. But this relief has always been afforded upon equitable principles, and some circumstances must exist to show that the party is justly entitled to it. There is no respectable case, where the contract is wholly executory and the time specific when the purchase money shall be paid, with an express condition of forfeiture if not paid at that time, and where the purchaser has never taken possession or expended anything on the premises, but waits for several years after the payments are due, and until there is a rise in value, in which the purchaser can obtain relief.—*Id.*
5. *Equity—Taxes, lands sold for, redemption of—Ignorantia legis.*—Within the time allowed to redeem certain lands sold for taxes, the owner, having been in the military service, made tender, under the act of March 12, 1867, of the amount of the tax, with ten per cent. interest. This being refused, he filed his petition to enjoin the delivery to the purchaser of his tax deed. The court, after the proceeding had remained in court till after the time for redemption had expired, decided the act relied on to be unconstitutional and the claim of the owner to be invalid, but allowed him to add to his tender the amount required by the statute to redeem, although the time of redemption had lapsed, and on payment of costs made the injunction perpetual. *Held*, that the rule *ignorantia legis*, etc., did not apply to such case, especially as the delay beyond the time of redemption was caused in part by the action of the court, and that equity in the premises properly relieved against such mistake of law.—*Haney v. Charles*, 157.
6. *Equity—Relief—Jurisdiction—Judgments, when not impeachable collaterally.*—A judgment, even though informal to the extent of granting a relief not contemplated by the petition, when parties are before the court and the relief is within its jurisdiction, is not a void proceeding, and can not be impeached collaterally.—*O'Reilly v. Nicholson*, 160.
7. *Equity—Devises of lands; of money in lieu of—Election—Conveyance of land pending election—What title conveyed.*—When the testator devises the interest of certain heirs in a specified tract of land to other members of his family, and also devises to said heirs certain moneys as their full share and just proportion of the land, the equity doctrine of election applies; the appearance of the heirs in court and their renunciation of the land is also an election; and the attempted conveyance by them, and its acceptance by the purchaser during suit in partition of the land, and while the election is being made, especially when the purchaser acted as a sort of attorney for them, and drew and swore them to their answer in that suit, is a gross and naked fraud attempted to be perpetrated upon the other heirs of the testator,

## EQUITY—(Continued.)

- a contempt of the court in which the proceedings are pending, and possesses no validity whatever.—*Id.*
8. *Equity—Improvements by husband on land of wife—Value of, reached by his creditors.*—The value of improvements placed by the husband on the land of the wife may be reached through appropriate chancery proceedings, and the amount thereof applied to the payment of claims existing against him at the time of such investment. In such case, when the estate can not be successfully apportioned in partition, chancery will decree a sale of it, and a division of the proceeds according to the rights of the respective parties.—*Kirby v. Bruns*, 234.
  9. *Practice, civil—Case involving law and equity—Voluntary non-suit, effect of.*—Where a suit involving legal and equitable proceedings was laid before a jury, and plaintiff voluntarily took a non-suit of the case without submitting the equity branch to court at all, this court will not relieve him.—*Id.*
  10. *Mortgages—Mortgagor may become purchaser, when.*—Where the mortgagor is privy to the sale of the mortgaged property, assents to the acquisition of title by the mortgagee, and afterward concurs in it, and there is no suspicion of fraudulent practice, the mortgagee may become the purchaser at his own sale; and the mere fact that at the time of the purchase he stipulates with the mortgagor for a re-acquisition of the property on repayment of the purchase money, will not, in the absence of proof showing an intention to that effect, remit the parties to their original relation as mortgagor and mortgagee. In such case the mortgagor could not, after slumbering in his rights for five years, enforce such stipulation in an action of ejectment.—*Medsker v. Swaney*, 273.
  11. *Fraud—Mortgage sale—Verbal agreement by mortgagor to reconvey—Effect of, as fraud in fact.*—Although in case of purchase by the mortgagee of mortgaged property, a mere verbal agreement by him to reconvey, on being reimbursed his advance, as a contract, would be invalid, as being within the statute of frauds; yet a refusal to convey within a year, or within a reasonable time, if that was the understanding, on being tendered his money, may be, in the absence of a satisfactory explanation, sufficient evidence of fraud in fact to set aside the conveyance and admit the mortgagor to his right of redemption.—*Id.*
  12. *Equity—Injunction to stay judgment—What diligence in defending original suit must be shown.*—A., who being personally and duly served with process, permits judgment to go against him by default, can not enjoin its execution on the ground that he was kept away from attendance at court by threats of bodily harm. Such allegation shows no use of reasonable diligence in his endeavors to defend. *Non constat* but he might have defended through counsel, without his personal attendance.—*Duncan v. Gibson*, 352.
  13. *Equity—Sheriff's sale—Misdescription—Purchase—Action for recovery of purchase money—Caveat emptor.*—A. owned certain described land in the north-west quarter of section thirty-five, township sixty, range thirty-six. Under execution against him, the sheriff, by mistake, sold and deeded to B. a tract similarly described in the north-east quarter of section twenty-five of the same township and range, to which A. had no title. The purchase money was paid, and went to extinguish the judgment against A. Supposing the land to be his, A. surrendered it to B., who moved on it and made improve-

## EQUITY—(Continued.)

ments. Afterwards, discovering the misdescription, A. regained possession, claimed the land, and refused to refund the purchase money. *Held*, that the doctrine *caveat emptor* had no application to such a case; that the consideration for the money paid on execution had failed, B. having no title to the land, and that an action for the recovery of the money so paid was properly maintainable.—*McLean v. Martin*, 393.

14. *Equity—Bill to rescind contract of sale of land—New consideration—Actual abandonment.*—A verbal agreement to rescind a contract under seal for the sale of land, made after payments are due, and founded upon no new consideration, unless followed by an actual abandonment of the sale by both parties and a restoration of the property, so far as possible, to the vendor, will be treated as invalid in a suit by the vendor for the stipulated purchase money.—*Pratt v. Morrow*, 404.

15. *Equity—Conveyances to hinder and delay creditors—Solvency of grantor, etc.*—In a suit in equity against a father and son to set aside a conveyance made by the former to the latter, the proof showed that at the time of the conveyance, in 1852, and long afterward, the father was in good circumstances and abundantly able to meet all his current liabilities. The testimony of certain witnesses having no personal interest in the matter, and given many years after the occurrence, showed that the father had said that the conveyance was made to defeat the collection of a security debt of fifty dollars, of the existence of which the only proof was his own statement. He testified that he paid the debt before judgment; that at the time of the purchase he had no recollection of its existence. *Held*, that the evidence showed no such fraud as to invalidate the deed.—*Grimes v. Russell*, 431.

16. *Injunction, when will lie in case of trespass.*—An injunction will not be awarded to restrain the commission of an ordinary trespass when the injury flowing from it is not irreparable, and where an adequate remedy may be had in the recovery of damages against a solvent party; but it will lie where the acts done or threatened are ruinous to the property trespassed upon, or are of a character to permanently impair its just enjoyment in the future.—*Echelkamp v. Schrader*, 505.

17. *Injunction—When title to locus in quo is uncertain, temporary injunction will be granted.*—When the right or title to the place in controversy, or to do the act complained of, is doubtful and explicitly denied in the answer, no permanent or perpetual injunction will usually be granted till such trial at law is had settling the contested rights and interests of the parties. In such case, where plaintiff is in possession of the title to the *locus in quo*, defendant is the proper party to bring the action to test the rights of the respective parties; and in the event of his failure to do so, the injunction should be made perpetual.—*Id.*

18. *Equity—Injunction allowable against trespasser, when.*—It is now a well-settled principle of equity jurisprudence that the remedy by injunction is allowable against a mere trespasser when the injury sought to be averted goes to the destruction of the inheritance, or is otherwise irreparable in its character. But the sole ground upon which an injunction is granted in such cases is that the trespass complained of operates such irreparable mischief that it is not susceptible of adequate compensation in the way of pecuniary damages;

**EQUITY—(Continued.)**

and the party seeking it must bring himself within this principle before he can be entitled to this remedy.—*Weigel v. Walsh*, 560.

19. *Equity—Proceedings in partition.*—A proceeding in chancery may be had for the partition of an equitable estate. (*Welch v. Anderson*, 28 Mo. 293; *Reinhardt v. Wendec*, 40 Mo. 577.)—*Reed v. Robertson*, 580.
20. *Equity—Partition of equitable estate—What averments sufficient.*—In a suit for the partition of equitable interests in real property, an averment of the petition that each party held an undivided half of the equitable estate, is sufficient, without any allegation that they held jointly or as tenants in common.—*Id.*
21. *Equity—Legal estate and possession in defendant as trustee of plaintiff—Ejectment, improper—Suit should be brought in equity.*—When the legal title and the right of possession of a portion of certain land were in defendant, as the trustee of plaintiff, and nothing showed any actual ouster or disseizin by defendant, plaintiff could not sue in ejectment, but should resort to a suit in equity for partition, subject to the terms of the deed of trust.—*Id.*

See ATTACHMENTS, 2. LANDS AND LAND TITLES, 13.

**ERRORS, CLERICAL.**

See PRACTICE, CIVIL—JUDGMENTS, 5.

**ERROR, WRIT OF.**

See PRACTICE, CIVIL—APPEAL.

**EVIDENCE.**

1. *Evidence—Certificate of deposit—Manual delivery, effect of.*—A. deposited a certain fund in bank, and, as evidence of his title, took a certificate of deposit payable to his own order. His title thus acquired must be presumed to continue until a divestment of it is shown, and a mere manual delivery of the certificate to B. without indorsement, and unaccompanied with evidence of a consideration paid, would not pass the title as against A.—*Vastine, Adm'r, v. Wilding*, 89.
2. *Practice, civil—Instructions—Evidence—Account, note given in payment of—Receipt—Jury.*—In a suit on an account, the mere acceptance by the plaintiff of notes given by defendant for the debt, and the giving of a receipt for the amount due, without further proof, does not constitute such evidence of payment as to warrant the court in sending the case to the jury.—*Doebling v. Loos*, 150.
3. *Practice, civil—Trial—Evidence—Deposition in former suit, when admissible—Privity of parties, etc.*—Suit in ejectment was brought by the son against the father, and the deposition of the latter was taken, full opportunity being given for cross-examination. Pending the trial the father died, and the suit was discontinued. Subsequently one involving the same issues was brought by the son against the father's widow, and his deposition filed in the latter suit. *Held*, that the deposition was admissible in evidence. To that end, complete identity of parties in the two actions was not required. It was sufficient that the defendants were in privity with each other. *Held, further*, that, there being no objection to the deposition on the ground of incompetency at the time it was taken, the subsequent decease of deponent would not, under the statute (2 Wagn. Stat. 1372, § 1), deprive the party of its benefit.—*Parsons v. Parsons*, 265.

## EVIDENCE—(Continued.)

4. *Crimes and punishments—Passing forged checks—Evidence—Handwriting—Comparison.*—In an action for passing a counterfeit or forged bank check, where the signature and indorsement were positively proved, and no other papers were introduced in evidence for the purpose of admitting testimony by comparison, it was competent to submit the whole paper to the jury, with or without the aid of experts, for them to form their own conclusion as to whether the whole instrument thereon was produced by one and the same hand.—*State v. Scott*, 302.
5. *Agent—Testimony of, binding on principal, when—Practice, civil—Actions ex contractu.*—In a suit against a sheriff for pasturage of certain cattle seized under execution, a promise to pay the amount claimed, by one who acted as his deputy in the transaction of the business, is binding on the sheriff. In such case, if the cattle remained in the plaintiff's pasture by his permission, he would be entitled to a reasonable compensation, even though they were originally placed there against his consent. Plaintiff, on such a state of facts, could properly recover in an action *ex contractu*.—*Stephenson v. Porter*, 358.
6. *Deeds—Lost instrument—Proof of loss, what sufficient—How determined.*—In order, under the statute (Gen. Stat. 1865, p. 448, § 38; Wagn. Stat. 279, § 38), to introduce secondary evidence of the contents of a deed, parties should show that they have in good faith reasonably exhausted all probable sources of information and means of discovery which the facts and circumstances of the case are calculated to suggest, and which are at the time within their reach. But no definite rule on the subject, applicable to all cases, can be laid down. The question whether the loss is sufficiently proved in any given case must be determined by the judge trying the cause, and is addressed to his judicial discretion.—*Christy v. Kavanaugh*, 375.

See BILLS AND NOTES, 18. CONVEYANCES, 12. DAMAGES, 15. EJECTMENT, 2, 3, 4. EXECUTION, 4. FRAUDS, STATUTE OF, 8. INSURANCE, 1. JUSTICES' COURTS, 2. LANDLORD AND TENANT, 11. LANDS AND LAND TITLES, 3. MERCHANTS, 1. PRACTICE, CIVIL—APPEAL, 10, 13, 15. PRACTICE, CIVIL—TRIALS, 1, 13, 15.

## EXCEPTIONS.

See PRACTICE, CIVIL—APPEAL.

## EXECUTIONS.

1. *Executions—Act March 23, 1863—Fresh levies after return day, effect of.*—Where an execution was levied, prior to the return day thereof, on certain property, it would not continue in force, under the act of March 23, 1863 (Sess. Acts 1863, p. 20, § 2), for the purpose of a fresh and independent levy on other property after the return day of the execution. Under that act the execution would afterwards be dead for all purposes, except the preservation of rights which attached prior to the return day by virtue of the antecedent levy.—*McDonald v. Gronefeld*, 28.
2. *Sheriff—Bond, liability on—Section 30, chapter 63, R. C. 1855.*—The obligor in a bond of indemnity given under section 30, ch. 63, R. C. 1855, is liable thereon to the sheriff as well as to persons claiming the property.—*Stewart v. Thomas*, 42.
3. *Sheriff—Execution—Indemnity bond, suit on, by sheriff—Notice to plaintiff in execution.*—Where judgment is rendered against a sheriff on his bond,



## EXECUTIONS—(Continued.)

for an unlawful levy, and he afterward sues plaintiff in the execution on his bond of indemnity (R. C. 1855, ch. 63, § 30), the latter may make any defense which could have been made in the original suit against the sheriff. Notice, with opportunity of making the defense, should have been given the plaintiff in the execution at the time of the first suit. Otherwise, the judgment is but *prima facie* evidence of his liability on the bond.—*Id.*

4. *Distress warrant—Execution—Sale and deed under.*—Where the State auditor issued a distress warrant (R. C. 1855, p. 1542, § 3 *et seq.*; Wagn. Stat. 1335, § 18 *et seq.*) against a county sheriff for default in payment of public money, and on failure to collect the amount thereof, levy was made on the land of the securities on his official bond, the authority of the sheriff to convey the property to the purchaser will not be presumed from the mere recitals in the conveyance itself. The execution of the bond, the default of defendant, the issue of the warrant, the failure to collect the amount from the principal obligor, must be shown *aliunde*. In the absence of a provision similar to that touching the title vested in the grantee in case of tax sales (Wagn. Stat. 1204, §§ 111-12), such recitals in a sheriff's deed, under a distress warrant, are not even *prima facie* evidence of the regularity of the previous proceedings.—*Cook v. Hacklemann*, 317.
5. *Executions—Judicial sales—Executions under distress warrant.*—The act touching judicial sales (R. C. 1855, p. 748, § 56; Wagn. Stat. 612, § 54) has no application to a sale under an auditor's distress warrant.—*Id.*
6. *Sales—Sheriff's, at Circuit Court-house door, during session, are valid, etc.*—Judgment was obtained in the Common Pleas Court of Cass county, while in session at Pleasant Hill, and execution was issued therefrom. But the sale by the sheriff was made at the court-house door of the Circuit Court, at Harrisonville, the county seat, during a term of the Circuit Court, and not at the place where the Common Pleas Court was held, nor during a session thereof. *Held*, that, under the statute concerning judicial sales (Wagn. Stat. 609, § 42), such sale was valid.—*Mers v. Bell*, 333.
7. *Executions—Garnishment—Justice's court—Jurisdiction—Judgment against garnishee before return day of writ.*—The statute limiting the jurisdiction of justices (Sess. Acts 1868, p. 59, § 1) has no application to garnishment proceedings. Under sections 27-40, Gen. Stat. 1865, the garnishee is authorized, without any resort to the justice at all, to deliver property or pay money sufficient to satisfy the execution, without regard to its amount; and the justice's jurisdiction as to the amount of his judgment is co-extensive with the authority given to the garnishee to pay over to the constable. In such case the justice may render judgment against the garnishee without waiting for the return day of the writ.—*Davis v. Staples*, 567.
8. *Execution—Justice's court—Garnishee entitled to injunction against plaintiff in execution, when.*—A garnishee in execution, before a justice, is not entitled to an injunction against the plaintiff simply on the ground that the amount seized exceeded the jurisdiction of the justice, or that judgment was entered against him before the return day of the writ. To entitle him to this remedy he must make a showing that it would be against conscience to execute the judgment complained of; that he has not been remiss in his



EXECUTIONS—(*Continued.*)

own duties, and that he has been deprived of his right by some fraud or accident.—*Id.*

See CORPORATIONS, 10, 17. JUSTICES' COURTS, 6. PRACTICE, CRIMINAL, 8, 9. REPLEVIN, 1.

## F

## FEES.

See CIRCUIT ATTORNEYS.

## FENCES.

See DAMAGES, 10, 11, 20.

## FIXTURES.

See LANDLORD AND TENANT, 1, 2. MECHANICS' LIEN, 1, 2.

## FORCIBLE ENTRY AND DETAINER.

See LANDLORD AND TENANT.

## FORGERY.

See PRACTICE, CRIMINAL.

## FRAUD.

See ADMINISTRATION, 4, 5, 6. COURTS, COUNTY, 2. FRAUDS, STATUTE OF. FRAUDULENT CONVEYANCES. MORTGAGES AND DEEDS OF TRUST, 1, 2.

## FRAUDS, STATUTE OF

1. *Land, sale of—Part performance—Escrow—Delivery of deed.*—A. made a verbal contract with B. for the purchase of certain land. Part of the purchase money was paid at the time. The remainder was to be paid in two weeks, when a warrantee deed for the property was to be given. The deed in the meantime was deposited with a third party as an escrow. At the time named for completing the contract, A. refused to pay the remainder, and having purchased of C., who held adversely to B., went into possession under him. *Held*, that the facts showed no such part performance as to take the case out of the statute of frauds. Such a deposit of the deed could not be made to operate as a delivery. At law the statute would be a complete bar to an action to recover the money due, even if the contract were so performed as to make it a fraud to seek to evade it.—*Townsend v. Hawkins*, 286.
2. *Statute of frauds—Contracts not to be performed in one year, executed by one party, statute can not be invoked by the other.*—The purchaser of a carding machine, by a verbal agreement with the vendor, bound himself not to use any other carding machine in the vicinity of the one sold, for a period of four years. In suit by the vendor for breach of the contract, *held*, that although the contract could not be wholly performed within one year, yet, having been completely executed by the plaintiff, defendant could not interpose the statute of frauds.—*Self v. Cordell*, 345.
3. *Frauds, statute of—Evidence of parol lease inadmissible, under petition counting on written instrument.*—In an action of damages for breach of a lease, where the petition counted upon a written lease when there was no such lease, but only a contract to pay money in consideration of a lease, it was

## FRAUDS, STATUTE OF—(Continued.)

incompetent to offer in support of that count either a parol lease or the written promise of defendant to pay money; and the court committed no error in ruling them out. But had the petition set out a parol lease, it would have been competent to prove it as well as the written agreement. In such case the agreement under which defendant was sought to be charged under the statute of frauds was the written obligation to pay rents.—*Browning v. Walbrun*, 477.

## FRAUDULENT CONVEYANCES.

1. *Equity — Conveyances to hinder and delay creditors — Solvency of grantor, etc.*—In a suit in equity against a father and son to set aside a conveyance made by the former to the latter, the proof showed that at the time of the conveyance, in 1852, and long afterward, the father was in good circumstances and abundantly able to meet all his current liabilities. The testimony of certain witnesses having no personal interest in the matter, and given many years after the occurrence, showed that the father had said that the conveyance was made to defeat the collection of a security debt of fifty dollars, of the existence of which the only proof was his own statement. He testified that he paid the debt before judgment; that at the time of the purchase he had no recollection of its existence. *Held*, that the evidence showed no such fraud as to invalidate the deed.—*Grimes v. Russell*, 431.
2. *Fraudulent conveyances — Purchase of goods procured upon credit by the vendor from a third party, upon fraudulent representations made by the vendee, effect of.*—Where the creditor of a firm in failing circumstances made such false representations to a third party as to induce him to sell goods to the debtor upon credit, and the original creditor afterwards obtained these goods in payment of his pre-existing debts, *held*, that although a clear case of liability in a direct action thus arises against him, he is not, therefore, incapacitated to purchase the goods.—*State, to use of Steinberger, v. Schuilein*, 521.
3. *Fraudulent conveyances — Stock in trade\* — Change of possession.*—When the original merchants are employed as clerks after the sale, there should be such marks of change that customers would be advised that the store had a new proprietor. (*Claffin v. Rosenberg*, 42 Mo. 439, affirmed.)—*Id.*

## G

## GARNISHMENT.

See ATTACHMENT. BILLS AND NOTES, 13. JUSTICES' COURTS, 9, 10.

## H

## HUSBAND AND WIFE.

1. *Conveyances — Fee simple — To married woman — Authority of to convey, with remainder over to heirs, etc.*—Certain land was conveyed to a married woman and her trustee, "to be sold and conveyed in fee, mortgaged, or rented," as she might, in writing, direct. The deed further provided that, in case of her death before her husband's, the estate might vest in her surviving children. *Held*, that her authority to convey was absolute and unlimited, and

## HUSBAND AND WIFE—(Continued.)

that the latter provision did not affect her power of alienation during the life of her husband: *semble*, that equity will enforce specific performance of a contract to purchase an estate so conveyed, upon tender of deed to the purchaser.—*Jecko, Trustee of Hume, v. Taussig*, 167.

2. *Partition—Wife of coparcener can not be party.*—It is unnecessary to make the wife of a person interested in the partition of lands a party to a proceeding for partition therein. (*Lee v. Lindell*, 22 Mo. 202.) If the land be divided in specie, her inchoate right attaches at once to her husband's share. If it be sold, she has no claim to any portion of the proceeds.—*Hinds v. Stevens*, 209.

3. *Dower—Act of 1855 touching partition—Death of husband after judgment and before sale.*—Under the act of 1855, touching partition (R. C. 1855, ch. 119), the judgment of sale was the final action of the court, and the wife of a coparcener, becoming a widow after judgment and before the sale, can not be made a party and have her interest ascertained by the court. She must look to the sheriff for her portion of the proceeds of the sale.—*Id.*

4. *Equity—Improvements by husband on land of wife—Value of, reached by his creditor.*—The value of improvements placed by the husband on the land of the wife may be reached through appropriate chancery proceedings, and the amount thereof applied to the payment of claims existing against him at the time of such investment. In such case, when the estate can not be successfully apportioned in partition, chancery will decree a sale of it, and a division of the proceeds according to the rights of the respective parties.—*Kirby v. Bruns*, 234.

5. *Husband and wife—Married women, act of 1865 concerning—Separate property of wife, acquired before act, not exempt under execution against husband.*—Under the act as to rights of married women (Gen. Stat. 1865, p. 464, § 14) there is no exemption of the interest of the husband in his wife's real estate, acquired in virtue of the marriage, from seizure and sale in satisfaction of his separate debts contracted after marriage and after the acquisition of her estate, when such indebtedness accrued and such real estate was acquired prior to that act becoming law. In its operation it acts only prospectively. Exemption acts of such character do not impair the pre-existing rights of creditors.—*Meyers v. Gale*, 416.

6. *Contracts—Marriage by slaves may be validated after emancipation.*—Slaves, in entering into marriage, do a moral act; and although not binding in law, it is no violation of any legal duty; and, as in the case of other parties incapacitated (as minors or insane persons), the contract may be assented to and ratified after the incapacity or disability is removed. It can make no difference that in his earlier days the husband had been already married; his first marriage had no legal existence. He was at liberty to repudiate it at pleasure; and by his continuing to live with his second wife, and acknowledging her as his lawful wife, after he had obtained his civil rights, he disaffirmed his first marriage and ratified his second.—*Johnson v. Johnson*, 595.

See DOWER. PRACTICE, CIVIL—PARTIES, 2. PRACTICE, CRIMINAL, 10, 12.

## I

## INDORSEMENT.

See **BILLS AND NOTES.**

## INFANTS.

1. *Judgment — Infants — Guardian ad litem — Void and voidable judgment.*— A judgment against an infant, who appears by attorney and not by guardian, although irregular and reversible on error, is merely voidable, and not absolutely void, so as to enable defendant to successfully resist a subsequent action upon it.—*Townsend v. Cox*, 401.
2. *Infants — Guardians — Religious faith.*— The provision (Wagn. Stat. 675. § 21) which prohibits committing the care of a minor to a person of religious persuasion different from that of the parents of the minor, if another suitable person can be found, etc., was adopted to secure in this matter the absolute equality before the law of all forms of religious faith. But where the record does not show that any person of the faith of the parents offered to take the children, and a person of different faith, but every way suitable otherwise, offered to take charge of them, *held*, that the action of the court in committing the care and custody of the children to this person was in no respect a violation of that provision.—*Voullaire v. Voullaire*, 602.

See **DAMAGES**, 7.

## INJUNCTION.

See **EQUITY**, 10, 16, 17, 18. **LANDLORD AND TENANT**, 2. **TRADE MARK**, 1.

## INSTRUCTIONS.

See **PRACTICE, CIVIL—TRIALS.** **PRACTICE, CRIMINAL.**

## INSURANCE.

1. *Insurance — Action on policy — Request to exhibit books, etc. — Refusal — Pleadings as to.*— In an action on an insurance policy, the condition contained in the policy, that the insured, if requested, should exhibit to the insurer, upon adjustment of loss, his books of account, invoices, etc., is not included in a general allegation by plaintiff of performance of conditions precedent to a right of recovery. Such condition can only be brought into the record by defendant; and if he does not tender an issue upon it, it is outside of the case. Defendant's answer having alleged demand for the books of account, etc., and refusal or neglect to exhibit them, plaintiff should deny the one or the other, or give some excuse for not complying with the demand. In such case plaintiff could not introduce evidence showing waiver by defendant of the production of books, etc., unless the waiver were pleaded in the replication.—*Mueller v. Putnam Fire Insurance Co.*, 84.
2. *Insurance.*— The rules of an insurance company provided that certain kinds of property might be insured, "if approved, at special rates," and that such special risks should be approved by an executive committee of three directors before a policy on the property should be issued. The by-laws of the company vested in the president a general supervision of its affairs. Property of the kind specified was insured at special rates, and the policy issued thereon was signed by the president and secretary, as required by the by-laws, but without the action of the executive committee. *Held*, that the policy being issued by the duly authorized agents of the company, and upon a full knowl-

## INSURANCE—(Continued.)

- edge of all the facts material to the risk, the company was liable on the policy, notwithstanding the non-action of the committee. The action of the committee was preliminary, and in this case must be held to have been waived.—*Merchants' and Manufacturers' Insurance Co. v. Curran*, 142.
3. *Agency—Skill and discretion—Agency not delegated.*—It is a settled principle in the law of agency that where an authority is conferred requiring skill or discretion on the part of an agent, and no power of substitution is given, then the agent must act in person, and the principal would not be bound by any act of a sub-agent. But this doctrine has no application to the responsibility of an accident insurance company for acts of its sub-agents.—*Brown, Adm'r, v. Railway Passengers' Assurance Co.*, 221.
  4. *Damages—Railroads—Accident policies—General accident tickets—Vexatious delay.*—An engineer killed on a railroad locomotive had previously purchased a ticket issued by the Railway Passengers' Assurance Company, which, by its terms, insured against death "caused by accident while traveling by public or private conveyance provided for the transportation of passengers." Suit being brought by his legal representatives on the policy, the proof showed that defendants were selling two classes of tickets, one known as the "traveler's risk," the other as the "general accident;" the latter sold for the highest price; that deceased purchased the latter; that at the time of the purchase defendant's agent knew him to be an engineer, and had no instructions not to sell to railroad employees. *Held*, that deceased was insured against all accidents, without regard to the capacity in which he was acting; that the ticket was intended to cover the accident by which he met his death; and that defendant was liable. *Held, also*, that it was the duty of defendant to pay upon notification of the death of deceased, and, on its refusal to comply, interest was thenceforth payable.—*Id.*
  5. *Insurance, accident, contract of—Stipulations, how construed.*—In a contract of insurance containing mutual stipulations, each stipulation is to be construed favorably to the party entitled to claim its benefit.—*Id.*
  6. *Insurance companies—Vexatious refusal, etc.—Damages determined by the jury.*—In actions against insurance companies under Gen. Stat. 1865, ch. 90, § 1, the whole question of vexatious refusal or delay in payment is to be determined by the jury. But before damages are allowed, it need not be explicitly proved by plaintiff that the delay or refusal was vexatious. If, upon a full consideration of all the facts and circumstances, they conclude that the refusal was unjustifiable and vexatious, the law authorizes them to assess the damages.—*Id.*
  7. *Fire insurance—Policy—Conditions—Meaning of words "partial" and "total" modified by understanding of parties.*—Attached to a fire insurance policy were the following conditions: "2. In case of total loss the company is not liable to pay more than two-thirds of the actual value of the building at the time of the loss, nor more than one-half the value of the personal property;" and "3. Partial losses are paid in full, not exceeding the amount insured, provided the insured has on hand the lowest amount stated in the application." The amount of goods to be kept on hand was stated in the application to be of the value of \$3,000. The loss of the insured was \$3,859, property of the value of some seventy dollars having been saved—making the total value of the stock on hand at the time of the loss, \$3,929. *Held*, that

INSURANCE—(Continued.)

the words "at the time of the loss," mentioned in the second clause, were applicable not only to the real property, but the merchandise on hand at that particular time; and that, within the true meaning of the two clauses taken together, the loss was not partial, so as to entitle the insured to recover the full amount of his insurance. The meaning of the words "partial" and "total" should be taken subject to such modification as may be necessary to an ascertainment of the actual understanding and intention of the parties.—*Singleton v. Boone County Home Mutual Insurance Co.*, 250.

See CORPORATIONS.

J

JEFFERSON CITY.

See BONDS, MUNICIPAL, 1, 2.

JOHNSON COUNTY.

See COURTS, COUNTY, 9.

JUDGMENTS.

See JUSTICES' COURTS. PRACTICE, CIVIL—JUDGMENTS.

JUDICIAL NOTICE.

See JUSTICES' COURTS, 2.

JURISDICTION.

1. *District Courts, jurisdiction of—Admiralty—Maritime liens.*—Maritime contracts, in the sense used in admiralty practice, and marine torts, in cases where a maritime lien arises, belong to the exclusive and original jurisdiction of the District Courts of the United States; and therefore those provisions in the statutes of this State which authorize actions *in rem* against vessels by name in such cases, are not sustainable.—*Mitchell v. Steamboat Magnolia*, 67.
2. *Admiralty—Steamboats, equipment of, at home port—Jurisdiction of State courts.*—The furnishing of the material for the equipment and outfit of a steamboat, at her home port, is not a regulation of commerce nor a maritime contract, but such a contract as it is competent for the States to act upon, and to create such liens in relation to, as their Legislatures may deem just and expedient.—*Id.*
3. *Mandamus—Jurisdiction of Circuit Courts by, over County Courts—Roads—Assessment of damages.*—In the matter of paying damages assessed for the right of way on a public road, Circuit Courts have jurisdiction over the County Court by *mandamus*, and in a proper case may issue the writ; and a writ of prohibition will not issue to prevent its erroneous exercise.—*Berkstresser v. Rice*, 283.
4. *Courts, inferior and local—Mechanics' liens—Situation of property, averment of petition as to.*—The Kansas City Court of Common Pleas was an inferior and local court. Under the act of March 2, 1859 (Sess. Acts 1858-9, p. 353, § 5), it had "concurrent jurisdiction with the Circuit Court to enforce mechanics' or other liens in Kaw township." In a suit in that court on a mechanics' lien sought to be enforced against certain property in Kaw township, *held*, that the petition, not averring that the property was situated in that township, was fatally defective. Where the judgments of local courts



## JURISDICTION—(Continued.)

and courts of inferior jurisdiction are called in question, the record should show affirmatively all the facts necessary to give them jurisdiction, both of the subject-matter of the suit and of the parties to it.—Schell v. Leland, 289.

5. *County Court, acting judicially, not subject to the control of the Circuit Court — Mandamus — Prohibition, at whose instance will lie.*—It is the settled doctrine that where the County Court acts judicially, as on its disapproval of an administrators's sale, the Circuit Court can not control its judgment. And in case of *mandamus* from the Circuit Court to compel the County Court to approve such sale, a writ of prohibition against the former will properly lie, for the reason that, although the Circuit, by its process, obtained jurisdiction of the party, it acquired none over the subject-matter of the action of the County Court; and the writ of prohibition may issue against it at the instance of any one of the parties, or even of a stranger.—Trainer v. Porter, 336.

See DAMAGES, 26. EQUITY, 6. JUSTICES' COURTS, 4, 9, 10. PRACTICE, CRIMINAL, 8, 9.

## JURY, SEPARATION OF.

See PRACTICE, CIVIL—TRIALS, 10.

## JUSTICES' COURTS.

1. *Justices' courts — Forcible entry and detainer — Appeal — Transcripts — Must be filed, when, during term of Circuit Court.*—In an action of forcible entry and detainer, where a judgment is rendered before a justice during a term of the Circuit Court, the justice is not obliged to furnish appellant with a transcript unless the affidavit and recognizance are filed with him before the sixth day after the judgment (Gen. Stat. 1865, ch. 188, §§ 11, 12, 23), and the omission to file the transcript within the six days is fatal to the appeal. The appellate court has no jurisdiction of the subject-matter in such case, and the consent of parties can not give it.—Robinson v. Walker, 117.
2. *Session of court, judicial cognizance of.*—In appeals of this sort it need not appear in proof that the Circuit Court was in session at the date of the judgment before the justice. The Circuit Court could officially know from its own records when it was in session.—*Id.*
3. *Courts, justices' — Items of account must show the amount sued for.*—In an action before a justice of the peace, the account sued on and the specific items claimed, and not the amount named in the prayer for judgment, must be taken as showing the "debt or balance" sued for.—Stephenson v. Porter, 358.
4. *Replevin — Justice's court — Frame building — Jurisdiction.*—An action in replevin before a justice of the peace for the recovery of a "frame building" is not bad on its face for want of jurisdiction. Whether the building was attached to the realty and constituted a part of it, so as to be the subject of an action in ejectment, or was a mere personal chattel, was a point to be settled by the evidence.—Elliott v. Black, 372.
5. *Replevin — Dismissal — Suit on return bond — Damages — Justice's court.*—When the complainant in a replevin suit fails to prosecute the same to a successful issue, that failure constitutes a breach of the condition of his return bond, and warrants a suit upon it, although there may have been no judgment in the replevin suit either for damages or a return of the property; and this is true whether the suit originated before a justice or the Circuit Court.—*Id.*

## JUSTICES' COURTS—(Continued.)

6. *Justices' courts — Transcripts — Executions — Returns touching summons — Execution returned within the time authorized by law, effect of — Collateral proceedings.*—In case of suit to set aside a sheriff's sale made under an execution issued in the Circuit Court upon a justice's transcript, the certificate of the justice appended thereto, that summons against defendant was returned "executed as the law directs," was sufficient evidence of proper summons, without the necessity of setting forth the same. Nor can the sale be impeached because the execution in the justice's court was returned unsatisfied sooner than the time authorized by law. For these irregularities the execution may be quashed in direct proceedings for that purpose, but not in collateral proceedings when the rights of third parties intervene.—*Norton v. Quimby*, 388.
7. *Justice's court — Statement in, must show what.*—A statement of facts constituting a cause of action in a justice's court is sufficient if it advise the opposite party of the nature of the claim, and be sufficiently specific to bar another action.—*Iba v. Hann. and St. Jo. Railroad Co.*, 469.
8. *Justice's court — Suit for damages — Obstruction of drain.*—A suit before a justice simply to recover damages for obstructing plaintiff's drain, does not involve an investigation of title to real estate.—*Williams v. Browning*, 475.
9. *Executions—Garnishment—Justice's court—Jurisdiction—Judgment against garnishee before return day of writ.*—The statute limiting the jurisdiction of justices (Sess. Acts 1868, p. 59, § 1) has no application to garnishment proceedings. Under sections 27–40, Gen. Stat. 1865, the garnishee is authorized, without any resort to the justice at all, to deliver property or pay money sufficient to satisfy the execution, without regard to its amount; and the justice's jurisdiction as to the amount of his judgment is co-extensive with the authority given to the garnishee to pay over to the constable. In such case the justice may render judgment against the garnishee without waiting for the return day of the writ.—*Davis v. Staples*, 567.
10. *Execution—Justice's court—Garnishee entitled to injunction against plaintiff in execution, when.*—A garnishee in execution before a justice is not entitled to an injunction against the plaintiff simply on the ground that the amount seized exceeded the jurisdiction of the justice, or that judgment was entered against him before the return day of the writ. To entitle him to this remedy he must make a showing that it would be against conscience to execute the judgment complained of; that he has not been remiss in his own duties, and that he has been deprived of his right by some fraud or accident.—*Id.*

See DAMAGES, 26.

## K

## KANSAS CITY COURT OF COMMON PLEAS.

See COURTS.

## L

## LANDLORD AND TENANT.

1. *Lands and land titles — Leases — Fixtures, removal of, agreement concerning.*—Where a building is erected by one person on the land of another by

## LANDLORD AND TENANT—(Continued.)

- his permission, upon an agreement or understanding that it may be removed at the pleasure of the builder, it does not become a part of the real estate, but continues to be a personal chattel and the property of the person who erected it.—*Goodman v. Hann. and St. Jo. R.R. Co.*, 33.
2. *Landlord and tenant—Injunction—Chattels, removal of.*—Where the landlord, before the expiration of the term, enjoins the tenant from removing the chattels or fixtures, the tenant will be allowed a reasonable time after the dissolution of the injunction within which to demand and remove the same.—*Id.*
  3. *Forcible entry and detainer—Section 36, chap. 187, Gen. Stat. 1865, construction of.*—A. claimed title to certain land by virtue of the possession of B., his grantor, but never had possession himself. *Held*, that section 36, chap. 187, Gen. Stat. 1865, concerning suits for forcible entry and detainer, by heirs, devisees, grantees, etc., of persons dispossessed under the statute, was not intended to apply to such cases. The heirs, etc., have no greater rights than the ancestor, if living, or the vendor, if he had not sold, could have had. The defendant must still be found guilty of actual dispossession. The object of the statute was not to change the rights or liabilities of the parties, but, when they had accrued, to provide that they should not lapse by death or sale.—*McCartney's Adm'r v. Alderson*, 35.
  4. *Forcible entry and detainer—Meaning of terms "disseizin" and "lawfully possessed."*—The statute concerning forcible entry and detainer (Gen. Stat. 1865, ch. 187) is a possessory action merely. The term "disseizin," as therein used, implies actual dispossession. The term "lawfully possessed" does not involve an inquiry into the lawfulness of the possession as regards title, but only in regard to the mode of obtaining it, and is equivalent to "peaceably possessed." In actions under this statute, proof of title in plaintiff, with payment of taxes and acts of ownership merely, is not evidence of peaceable possession.—*Id.*
  5. *Forcible entry and detainer—Possession of a portion of premises, with title to the whole, effect of.*—The possession of a portion of the premises in dispute carries the possession of the whole, if the title covers the whole.—*Id.*
  6. *Forcible entry and detainer—Landlord—Disseizin of tenant.*—The landlord has no such possession as will enable him to complain of a disseizin of his tenant.—*Id.*
  7. *Justices' courts—Forcible entry and detainer—Appeal—Transcripts—Must be filed, when, during term of Circuit Court.*—In an action of forcible entry and detainer, where a judgment is rendered before a justice during a term of the Circuit Court, the justice is not obliged to furnish appellant with a transcript unless the affidavit and recognizance are filed with him before the sixth day after the judgment (Gen. Stat. 1865, ch. 188, §§ 11, 12, 23), and the omission to file the transcript within the six days is fatal to the appeal. The appellate court has no jurisdiction of the subject-matter in such case, and the consent of parties can not give it.—*Robinson v. Walker*, 117.
  8. *Session of court, judicial cognizance of.*—In appeals of this sort it need not appear in proof that the Circuit Court was in session at the date of the judgment before the justice. The Circuit Court could officially know from its own records when it was in session.—*Id.*
  9. *Forcible entry and detainer—Action by purchaser against lessee in possession, what question submitted to the jury—Construction of statute.*—In an

## LANDLORD AND TENANT—(Continued.)

- action of forcible entry and detainer by the purchaser of certain property against a lessee in possession, it is proper to submit to the jury by an instruction, the question whether plaintiff, by proper conveyances, had succeeded to the right and remedies of the lessor. (Gen. Stat. 1865, p. 733, §§ 36, 40; Wagn. Stat. 648, §§ 36, 40.)—*Gillette v. Mathews*, 307.
10. *Forcible entry and detainer—Peaceable possession—Limitation of three years—Does not apply, when.*—The three-years limitation to proceedings for forcible entry and detainer (Gen. Stat. 1865, ch. 187, § 27; Wagn. Stat. 646, § 27) does not apply to cases where defendant was lessee, and held his possession under plaintiff, as lessor, or under the plaintiff's grantor, or under the prior owner.—
11. *Forcible entry and detainer—Collusion between defendant and tenant—Presence of plaintiff, testimony touching, competency of.*—When the petition in an action of forcible entry and detainer charged that defendant obtained possession through collusion with a tenant of plaintiff, proof negating the averment of collusion is competent, and its competency is in no way affected by the fact of plaintiff's presence or absence when defendant got possession.—*Smith v. Meyers*, 434.
12. *Forcible entry and detainer—Question of title not proper in action of.*—The question of title is in no way involved in an action of forcible entry and detainer.—*Id.*

## LANDS AND LAND TITLES.

1. *Lands and land titles—Leases—Fixtures, removal of, agreement concerning.*—Where a building is erected by one person on the land of another by his permission, upon an agreement or understanding that it may be removed at the pleasure of the builder, it does not become a part of the real estate, but continues to be a personal chattel and the property of the person who erected it.—*Goodman v. Hann. and St. Jo. R.R. Co.*, 33.
2. *Lands and land titles—Tax collector's deed—Title of State of Missouri—Of former purchaser—What title conveyed.*—A tax collector's deed which purports to convey to the purchaser "all the right, title, and estate" of the State of Missouri in and to the premises, and does not purport to convey anything more, can pass no title to the purchaser.—*Einstein v. Gay*, 62.
3. *Lands and land titles—Confirmation—Assignment—Act of July 4, 1836.*—The board of commissioners, under the act of Congress of July 4, 1836, confirmed a certain lot "to A. or his legal representatives." *Held*, that the party claiming must do so, if not in his own name, at least in his own person, and produce evidence of his title as such legal representative. This being done, the title will inure to his own benefit; and it is not necessary that the confirmation should be made to him by name. (*Connoyer et al. v. Washington University*, 36 Mo. 481.)—*Connoyer v. LaBeaume's Heirs*, 139.
4. *Equity—Devises of lands; of money in lieu of—Election—Conveyance of land pending election—What title conveyed.*—When the testator devises the interest of certain heirs in a specified tract of land to other members of his family, and also devises to said heirs certain moneys as their full share and just proportion of the land, the equity doctrine of election applies; the appearance of the heirs in court and their renunciation of the land is also an election; and the attempted conveyance by them and its acceptance by the purchaser during suit in partition of the land, and while the election is being

## LANDS AND LAND TITLES—(Continued.)

- made, especially when the purchaser acted as a sort of attorney for them, and drew and swore to their answer in that suit, is a gross and naked fraud attempted to be perpetrated upon the other heirs of the testator, a contempt of the court in which the proceedings are pending, and possesses no validity whatever.—*O'Reilly v. Nicholson*, 160.
5. *Lis pendens*—*Deed void*.—The deed of a party *pendente lite* is void, and even an innocent purchaser would take nothing by his deed, and could convey nothing; and a purchaser *pendente lite* is bound by the decree that may be made against the person from whom he derives title.—*Id.*
  6. *Terms "fee," "fee simple," "fee simple absolute," meaning of*.—In modern estates the several terms "fee," "fee simple," and "fee simple absolute" are substantially synonymous.—*Jecko, Trustee of Hume, v. Taussig*, 117.
  7. *Conveyances—Fee simple—To married woman—Authority of to convey, with remainder over to heirs, etc.*—Certain land was conveyed to a married woman and her trustee, "to be sold and conveyed in fee, mortgaged, or rented," as she might, in writing, direct. The deed further provided that, in case of her death before her husband's, the estate might vest in her surviving children. *Held*, that her authority to convey was absolute and unlimited, and that the latter provision did not affect her power of alienation during the life of her husband: *semble*, that equity will enforce specific performance of a contract to purchase an estate so conveyed upon tender of deed to the purchaser.—*Id.*
  8. *Lands and land titles—Possession must be adverse*.—Possession, to give title, must not only be continued, open, and notorious, but adverse.—*Thomas v. Babb*, 384.
  9. *Lands and land titles—Occupation by mistake or ignorance, effect of—Disseizin*.—If defendant in an ejectment suit erected his fence accidentally upon plaintiff's land, through mistake or ignorance of the correct line separating the tracts, and without intending to claim beyond the true line, then the line of occupation thus taken, and the possession that followed it, did not work a disseizin.—*Id.*
  10. *Ejectment—Proof of sheriff's deed proper under general issue*.—In a suit in ejectment, the deed of a sheriff conveying the property in controversy to defendant, under a judicial sale, is admissible in evidence as well under the general issue, as showing a defect of title in the plaintiff, as under special averments.—*Brown v. Brown*, 412.
  11. *Ejectment—Title from common source—Title by defendant at sale under judgment against plaintiff—Prima facie case for plaintiff—Rebutted, how*.—It is an established principle that in ejectment suits, where both litigants claim title through the same third party, it is sufficient for the plaintiff to deduce title from the common source, and when defendant claims through purchase at sheriff's sale of the property, under judgment of another against plaintiff, he thereby admits the validity of plaintiff's title up to the date of the sale, and concedes a *prima facie* case to plaintiff; and the burden of proof devolves upon him to overcome it by showing that plaintiff's title has vested in himself, or come to a determination in some other way.—*Id.*
  12. *Lands and land titles—Boundaries fixed—Monuments must prevail over linear measurements*.—A., being owner of 120 feet on Third street, in the city of St. Louis, deeded to B. 60 feet thereof, described as adjoining on the north



## LANDS AND LAND TITLES—(Continued.)

his grantors. B. afterward conveyed to C. the northern 30 feet of this property, and the remainder to D., being 30 feet to each. In a controversy between C. and D. as to location, *held*, that were there any monuments fixing the southern boundary of A.'s original land, they must prevail over the linear measurements. Otherwise D. must yield to C., and, unless barred by adverse possession, will be entitled to recover a similar tract from his southern neighbor.—*Kellogg v. Mullen*, 571.

13. *Land claim under Spanish permission of settlement conveys only the equitable title, but equitable title sufficient for the confirmation.*—A claimant of land under a Spanish permission of settlement has merely an equitable title. The legal title would not pass to the heir till the claim was confirmed by the United States; but the equitable title, for the purposes of confirmation, would be sufficient. The confirmation would inure equally to the claimant, be his title legal or equitable.—*Carpenter v. Rannels*, 584.
14. *Lands and land titles—Claims before board of land commissioners by B., as assignee of A.—Confirmation to A. or his legal representatives—Effect of on claim of B.*—Where the records of the proceedings before the board of United States land commissioners for the adjustment of claims, in 1811, showed that B., as assignee of A., claimed certain land, under the act of Congress of March 2, 1805 (U. S. Stat. 324), and produced to the board evidence of his derivative title, the legal effect of a judgment of the board confirming the land "to A. or his legal representatives" was to confirm the title to B., although his name was omitted in the form of the confirmation.—*Id.*
15. *Recorder of land titles, headings of—Records of U. S. land commissioner superior to.*—The titles for headings prefixed by the recorder of land titles to his records of papers in a case must yield if they come in conflict with the records of the United States land commissioners. Such title or heading of papers, recorded by the recorder, neither fixed their character nor determined the fact as to who the claimant was.—*Id.*

See CONTRACTS, 11. CONVEYANCES, 6, 8. EJECTMENT. FRAUDS, STATUTE OF, 1. JUSTICES' COURTS, 8. LANDLORD AND TENANT, 12.

## LEASE.

See FRAUDS, STATUTE OF, 3. LANDLORD AND TENANT, 1. LANDS AND LAND TITLES, 1. MECHANICS' LIEN, 1.

## LEGISLATURE.

See BANKS AND BANKING, 1, 2, 3. CONSTITUTION.

## LEVY.

See PRACTICE, CIVIL—JUDGMENTS, 2.

## LIEN.

See BOATS AND VESSELS, 1, 2, 4. MECHANICS' LIEN. REVENUE, 2.

## LIMITATIONS.

1. *Limitations—Administrator's bond—Construction of statute.*—An action on an administrator's bond has ten years to run from the time of the accruing of the action. (R. C. 1855, ch. 103, art. II, § 2.) Section 9, ch. 191, Gen. Stat. 1865, amending section 3, art. II, of the practice act of 1849 (Sess. Acts 1849, p. 74), was intended to enlarge the range of the ten years' limitation, as applied to personal actions, so as to include actions upon written instruments, where the payments contemplated by the obligation were to arise indirectly



## LIMITATIONS—(Continued.)

- and collaterally, as well as directly. Section 48, art. I, ch. 2, R. C. 1855 (Gen. Stat. 1865, ch. 120, § 49), limiting actions against the sureties of administrators to seven years, is restrictive in its character, and was framed upon the evident hypothesis that the general limitation act provided a longer time in which such suits could be brought.—*Martin v. Knapp*, 48.
2. *Mechanics' lien, action on—Continuous delivery—Statutory limitation.*—In suit on a mechanics' lien, the petition alleged that between certain dates plaintiffs delivered divers material to defendants. The first delivery was more than six months anterior to the filing of the lien. *Held*, that a fair construction of this averment was that the sales and deliveries were continuous between the dates mentioned, and that the whole account was brought within the statutory limit of six months. (Gen. Stat. 1865, ch. 195, § 5.)—*Cantwell v. Massman*, 103.
3. *Limitations—Special tax bills, statute applies to.*—A special tax bill issued more than five years prior to commencement of suit for its collection, is barred by the statute of limitations. (Gen. Stat. 1865, ch. 191, § 10.) In such suit the city is the substantial plaintiff; and as that section in terms applies to demands in favor of the State, by implication it also applies to demands of a city corporation created by the State, in the absence of any provision to the contrary.—*City of St. Louis, to use of Dippelheuer, v. Newman*, 138.
4. *Partnership—Part payment by one partner—Statute of limitations.*—Part payment of a firm debt by one partner, after dissolution, within five years before suit brought, will take the debt out of the operation of the statute of limitations as to the other partner; but *semble*, that the rule would not apply in case of part payment made after the statute had run and the debt had been barred.—*McClurg v. Howard*, 365.
5. *Mechanics' lien—Limitation of actions.*—The law limiting the time for commencement of suit after filing the account under mechanics' lien, which was in force at the time of beginning such suit, must prevail over such law of limitation which prevailed at the time of filing the account. (*Hauser v. Hoffman*, 32 Mo. 334, affirmed.)—*Forcht v. Short*, 377.
6. *Bills and notes—Contribution—Suit for, by co-surety—Statute of limitations.*—In case of suit for contribution by a surety on a bill of exchange against his co-surety, the statute of limitations commences running against his claim from and after the day on which he paid the original judgment on the bill, and not from the time when the bill was dated; and his claim is not operated on by the limitation of ten years, but by that of five.—*Singleton v. Townsend*, 379.

See BILLS AND NOTES, 11. LANDLORD AND TENANT, 10. LANDS AND LAND TITLES, 8, 9. PRACTICE, CIVIL—PLEADING, 5. SHERIFF, 3.

## LIS PENDENS.

See CONVEYANCES, 3. MANDAMUS, 2.

## M

## MANDAMUS.

1. *Practice, Civil—Appeal to District Court—Bond—Mandamus—Writ of error.*—The Cape Girardeau Court of Common Pleas granted an appeal to

**MANDAMUS—(Continued.)**

the Second District Court, with the proviso that no transcript should be made out until the filing of the bond. *Held*, that such proviso was unwarranted; but the clerk, acting under the direction of the court, properly refused to issue the transcript in default of bond, and *mandamus* would not lie against him to compel its issue. The proper remedy of appellant in such case would be writ of error.—*State ex rel. Benne v. Englemann*, 27.

2. *Practice, civil—Lis pendens—Plea in abatement—Board of education—Board de facto.*—Proof of the pendency of a former suit between the same parties, founded on the same cause of action, is not a good ground for abatement unless the subsequent suit, on actual examination, proves to be vexatious and unnecessary. And where execution on a judgment in favor of the treasurer of a board of public schools, against a county treasurer, was stayed by appeal to a District Court, proceedings in *mandamus* to enforce speedy payment of the amount sued for were not vexatious or unnecessary, so as to furnish good ground for a plea in abatement. In the latter proceedings, if persons constitute a board *de facto*, the legality of their election is not a subject of inquiry. Being a board *de facto*, the county treasurer may safely pay over money to them.—*State ex rel. Craig v. Dougherty*, 294.
3. *Mandamus—Suit on bond—Board of education.*—The fact that the treasurer of a board of public schools has a remedy on the official bond of a county treasurer for non-payment of money, will not prevent his proceeding against him by *mandamus*.—*Id.*
4. *Board of education—County treasurer—Mandamus—Amount to be paid over not inquired into.*—In *mandamus* by the treasurer of a board of public schools against a county treasurer for non-payment of money owing to the board, this court will not investigate the question of the amount to be paid, or order the payment of a specific sum; but will require him to pay over the actual balance of collections in his hands, whatever it may be.—*Id.*

See COURTS, COUNTY, 8. JURISDICTION, 3, 5. ROADS, COUNTY, 2.

**MARRIED WOMEN.**

See HUSBAND AND WIFE.

**MECHANICS' LIEN.**

1. *Mechanics' lien—Leasehold estate does not extend to boilers or engines.*—Sections 2 and 4 of the act concerning mechanics' liens (Gen. Stat. 1865, ch. 195) extended the lien to a building erected by a tenant upon leased premises with power of removal, but not to engines and boilers erected by him thereon. The term "improvement," as used in that act, is synonymous with "building," and does not include engines and boilers.—*Collins v. Mott*, 100.
2. *Mechanics' lien—Meaning to be attached to decision in Koenig v. Mueller.*—The decision in *Koenig v. Mueller*, 39 Mo. 165, was not intended to assert that no improvements which could be removed from the leased premises are subjects of a mechanics' lien, but only that when the building belongs to the landlord, in selling the tenant's term, his movable improvements should not pass.—*Id.*
3. *Mechanics' lien, action on—Continuous delivery—Statutory limitation.*—In suit on a mechanics' lien, the petition alleged that between certain dates plaintiffs delivered divers material to defendants. The first delivery was more than six months anterior to the filing of the lien. *Held*, that a fair

**MECHANICS' LIEN—(Continued.)**

construction of this averment was that the sales and deliveries were continuous between the dates mentioned, and that the whole account was brought within the statutory limit of six months. (Gen. Stat. 1865, ch. 195, § 5.)—*Cantwell v. Massman*, 103.

4. *Courts, inferior and local—Mechanics' liens—Situation of property, averment of petition as to.*—The Kansas City Court of Common Pleas was an inferior and local court. Under the act of March 2, 1859 (Sess. Acts 1858-9, p. 353, § 5), it had "concurrent jurisdiction with the Circuit Court to enforce mechanics' or other liens in Kaw township." In a suit in that court on a mechanics' lien sought to be enforced against certain property in Kaw township, *held*, that the petition, not averring that the property was situated in that township, was fatally defective. Where the judgments of local courts and courts of inferior jurisdiction are called in question, the record should show affirmatively all the facts necessary to give them jurisdiction, both of the subject-matter of the suit and of the parties to it.—*Schell v. Leland*, 289.
5. *Mechanics' liens—Four months expiring Sunday, lien must be filed Saturday.*—Under the mechanics' lien law (Wagn. Stat. 909, § 5), when the four months after the indebtedness accrued expired on Sunday, the lien is insufficient unless filed on the Saturday preceding. The act touching construction of statutes (Wagn. Stat. 888, § 6) must be construed in its restrictive sense, and in the case supposed both the first and last day must be excluded.—*Patrick v. Faulke*, 312.
6. *Mechanics' lien—Limitation of actions.*—The law limiting the time for commencement of suit after filing the account under mechanics' lien, which was in force at the time of beginning such suit, must prevail over such law of limitation which prevailed at the time of filing the account. (*Hauser v. Hoffman*, 32 Mo. 334, affirmed.)—*Forcht v. Short*, 377.
7. *Mechanics' lien—Statement of the balance due the plaintiff, without detailed statement of credits, etc., insufficient.*—The term "account," as used in the mechanics' lien law, means a detailed statement of mutual demands in the matter of debit and credit, arising out of a contract, or some fiduciary relation between parties; and a statement filed in a mechanics' lien suit which does not show even the aggregate of the different items, or the aggregate of the credits on account of the work, but simply sets down, in a round sum, what the plaintiff's claim as the balance due them, is insufficient.—*McWilliams v. Allan*, 573.

**MERCHANTS.**

1. *Criminal law—Dealing as merchant—Definition of merchant.*—One who manufactures and supplies goods to the previous orders of his customers alone, although he keeps on hand, but not for sale, the materials from which the manufactured articles are produced, is not a merchant within the meaning of the statute (Wagn. Stat. 937, § 1). (*State v. West*, 34 Mo. 424.)—*State v. Richeson*, 575.
2. *Criminal law—Information for dealing as merchant without license—What dealings constitute a merchant—Burden of proof on defendant, to show what.*—In an action by the State against one engaged in the manufacture of white lead, for exercising the trade and business of a "merchant without license," the State would make out a *prima facie* case by showing that defendant, after receiving orders from his customers, filled them the same and succeeding

**MERCHANTS—(Continued.)**

days. The natural inference would be that he kept the articles on hand; and to rebut this inference it was not sufficient to show that he *might* have manufactured the lead after the orders were received, but he should have shown that he did so manufacture it.—*Id.*

**MISTAKE.**

See CONVEYANCES, 9, 10, 11. ERRORS, CLERICAL. LANDS AND LAND TITLES, 9. SHERIFF, 5.

**MORTGAGES AND DEEDS OF TRUST.**

1. *Mortgages—Mortgagor may become purchaser, when.*—Where the mortgagor is privy to the sale of the mortgaged property, assents to the acquisition of title by the mortgagee, and afterwards concurs in it, and there is no suspicion of fraudulent practice, the mortgagee may become the purchaser at his own sale; and the mere fact that at the time of the purchase he stipulates with the mortgagor for a re-acquisition of the property on repayment of the purchase money, will not, in the absence of proof showing an intention to that effect, remit the parties to their original relation of mortgagor and mortgagee. In such case the mortgagor could not, after slumbering in his rights for five years, enforce such stipulation in an action of ejectment.—*Medsker v. Swaney*, 273.
2. *Fraud—Mortgage sale—Verbal agreement by mortgagor to reconvey—Effect of, as fraud in fact.*—Although in case of purchase by the mortgagee of mortgaged property, a mere verbal agreement by him to reconvey, on being reimbursed his advance, as a contract, would be invalid, as being within the statute of frauds; yet a refusal to convey within a year, or within a reasonable time, if that was the understanding, on being tendered his money, may be, in the absence of a satisfactory explanation, sufficient evidence of fraud in fact to set aside the conveyance and admit the mortgagor to his right of redemption.—*Id.*
3. *Bills and notes secured by deed of trust—Priority of payment, although all become due on default of payment on one note.*—Although by the express terms of a deed of trust the notes secured all became due upon the first default in payment, it did not follow that they stood upon an equality in the distribution of the fund. Without an express agreement to that effect, the priority of claims in such case will not be impaired or interfered with. (*Mitchell v. Ladew*, 36 Mo. 526; *Mason v. Barnard*, *id.* 384, affirmed.)—*Hurck v. Erskine*, 484.

See CONTRACTS, 4. TRUSTS, 1.

**N****NEGLIGENCE.**

See DAMAGES.

**NEW TRIALS.**

See COURTS, ST. LOUIS CIRCUIT.

**NON-SUIT.**

See PRACTICE, CIVIL, 1.

**NOTICE.**

See PRACTICE, CIVIL, 2, 3.

## O

## OFFICERS.

1. *Sheriff—Bond, liability on—Section 30, chapter 63, R. C. 1855.*—The obligor in a bond of indemnity given under section 30, ch. 63, R. C. 1855, is liable thereon to the sheriff as well as to persons claiming the property.—*Stewart v. Thomas, Adm'r of Ball, 42.*
2. *Sheriff—Execution—Indemnity bond, suit on, by sheriff—Notice to plaintiff in execution.*—Where judgment is rendered against a sheriff on his bond, for an unlawful levy, and he afterward sues plaintiff in the execution on his bond of indemnity (R. C. 1855, ch. 63, § 30), the latter may make any defense which could have been made in the original suit against the sheriff. Notice, with opportunity of making the defense, should have been given the plaintiff in the execution at the time of the first suit. Otherwise, the judgment is but *prima facie* evidence of his liability on the bond.—*Id.*
3. *Quo warranto—County sheriff—Vacancy—Title to office.*—A vacancy in the office of sheriff, such as a County Court is authorized to fill, implies a state of things where no one has any title to the office. Such vacancy does not exist when, on *quo warranto*, judgment of ouster against the incumbent of the office was obtained on the ground that relator had a superior title.—*State ex rel. McCune v. Ralls County Court, 58.*
4. *State ex rel. McCune v. The County Court of Ralls County, ante, p. 58, affirmed.*—*State ex rel. Rice v. Ralls County Court, 61.*
5. *Distress warrant—Execution—Sale and deed under.*—Where the State auditor issued a distress warrant (R. C. 1855, p. 1542; § 3 *et seq.*; Wagn. Stat. 1335, § 18 *et seq.*) against a county sheriff for default in payment of public money, and on failure to collect the amount thereof, levy was made on the land of the securities on his official bond, the authority of the sheriff to convey the property to the purchaser will not be presumed from the mere recitals in the conveyance itself. The execution of the bond, the default of defendant, the issue of the warrant, the failure to collect the amount from the principal obligor, must be shown *aliunde*. In the absence of a provision similar to that touching the title vested in the grantee in case of tax sales (Wagn. Stat. 1204, §§ 111-12), such recitals in a sheriff's deed, under a distress warrant, are not even *prima facie* evidence of the regularity of the previous proceedings.—*Cook v. Hacklemann, 317.*
6. *Executions—Judicial sales—Executions under distress warrant.*—The act touching judicial sales (R. C. 1855, p. 748, § 56; Wagn. Stat. 612, § 54) has no application to a sale under an auditor's distress warrant.—*Id.*
7. *Mandamus—Election of judge to Legislature—Pay of a judge while member of Legislature.*—Under section 11, article 4, Constitution of Missouri, where one holding the office of judge of a Circuit Court qualified and took his seat in the Legislature, he elected to vacate the office of judge, and would not be entitled to his salary as judge afterwards. He should, however, receive pay after the time of his election to the Legislature till he qualified as member.—*Owens v. Draper, 355.*

See AGENCY, 3. CIRCUIT ATTORNEYS. COURTS, COUNTY, 4. ELECTIONS, 4. MANDAMUS, 5. PRACTICE, CRIMINAL, 2, 3. QUO WARRANTO, 1, 2, 3. REVENUE, 4. ST. LOUIS, CITY OF, 1, 2, 3. SHERIFF.

## OFF-SET.

See CORPORATIONS, 7.



## P

## PARTITION.

1. *Partition—Wife of coparcener can not be party.*—It is unnecessary to make the wife of a person interested in the partition of lands a party to a proceeding for partition therein. (*Lee v. Lindell*, 22 Mo. 202.) If the land be divided in specie, her inchoate right attaches at once to her husband's share. If it be sold, she has no claim to any portion of the proceeds.—*Hinds v. Stevens*, 209.
2. *Equity—Proceedings in partition.*—A proceeding in chancery may be had for the partition of an equitable estate. (*Welch v. Anderson*, 28 Mo. 293; *Reinhardt v. Wendeck*, 40 Mo. 577.)—*Reed v. Robertson*, 580.
3. *Equity—Partition of equitable estate—What averments sufficient.*—In a suit for the partition of equitable interests in real property, an averment of the petition that each party held an undivided half of the equitable estate, is sufficient, without any allegation that they held jointly or as tenants in common.—*Id.*

## PARTNERSHIP.

1. *Partnership—Weight of testimony not passed on by Supreme Court.*—In suit to recover a moiety of partnership assets, this court will not pass on the question of the weight of testimony.—*Gillespie v. Early*, 159.
2. *Partnership—Part payment by one partner—Statute of limitations.*—Part payment of a firm debt by one partner, after dissolution, within five years before suit brought, will take the debt out of the operation of the statute of limitations as to the other partner; but *semble*, that the rule would not apply in case of part payment made after the statute had run and the debt had been barred.—*McClurg v. Howard*, 365.

See BILLS AND NOTES, 16, 17. REPLEVIN, 1, 2, 3.

## PART PERFORMANCE.

See FRAUDS, STATUTE OF, 1.

## PRACTICE, CIVIL.

1. *Practice, civil—Case involving law and equity—Voluntary non-suit, effect of.*—Where a suit involving legal and equitable proceedings was laid before a jury, and plaintiff voluntarily took a non-suit of the case without submitting the equity branch to the court at all, this court will not relieve him.—*Kirby v. Bruns*, 234.
2. *Practice, civil—Orders of publication, facts authorizing—Statement of in petition or affidavit—Issue of in vacation, when allowable.*—Under the statute relating to orders of publication (*Wagn. Stat.* 1008 § 13), when the facts authorizing publication were neither stated in plaintiffs' petition nor in an affidavit filed at the commencement of the suit, no order was allowable in vacation. Section 15 of the same chapter does not authorize an order of publication in vacation at all, but intends that it shall be made by the Court at the regular return term. And an order of publication rendered in vacation, on a sheriff's return that defendant was "not found," is a nullity.—*Schell v. Leland*, 289.
3. *Practice, civil—Defective service, when waived and when not.*—An appearance and defense will be considered as a waiver of an imperfect return or defective service. But the appearance of a defendant for the especial purpose



## PRACTICE, CIVIL—(Continued.)

of moving the court to arrest a judgment constitutes no waiver of any valid objection which he has to defective process and service.—*Id.*

4. *Practice, civil—Lis pendens—Plea in abatement—Board of education—Board de facto.*—Proof of the pendency of a former suit between the same parties, founded on the same cause of action, is not a good ground for abatement unless subsequent suit, on actual examination, proves to be vexatious and unnecessary. And where execution on a judgment in favor of the treasurer of a board of public schools, against a county treasurer, was stayed by appeal to a District Court, proceedings in *mandamus* to enforce speedy payment of the amount sued for were not vexatious or unnecessary, so as to furnish good ground for a plea in abatement. In the latter proceedings, if persons constitute a board *de facto*, the legality of their election is not a subject of inquiry. Being a board *de facto*, the county treasurer may safely pay over money to them.—*State ex rel. Craig v. Dougherty*, 294.
5. *Bills and notes, action on—Averments as to title—Pre-existing indebtedness—Manner of acquiring ownership—Allegation as to, immaterial.*—In a suit on a promissory note, the petition alleged that the payer transferred the note to plaintiff "for a valuable consideration to the payee in hand paid." *Held*, that proof showing the note to have been sold plaintiff in satisfaction of a pre-existing debt, sufficiently sustained the averment of the petition in regard to title. Under such averment the only material fact to be established was that of ownership; and the manner of acquiring it, whether by purchase with cash or other property, or by a discharge of pre-existing indebtedness, is of no importance.—*Wilson v. Murphy*, 409.
6. *Bills and notes, suits on—Pendency of attachment suit wherein defendant was garnishee, no defense, when.*—In a suit on a note by the assignee of the payee against the makers, the pendency of an attachment suit against the payee, wherein the makers were sued as garnishees, would constitute no defense if the assignment was in fact made before the garnishment. The pendency of the attachment might be pleaded in bar, provided the defense alleged that the note sued on was, *e. g.*, in fact still the property of the attachment debtor, and not simply charged by the creditor as his property. The garnishee may protect himself from liability to double payment by conforming to the requirements of the statute. (*Wagn. Stat.* 668, §§ 25-6.)—*Id.*
7. *Practice, civil—Motion to dismiss—Failure to except, effect of.*—When no exceptions are taken to the action of the Circuit Court in overruling a motion to dismiss for want of due service of summons, its action in that behalf is not open to review in the Supreme Court.—*Williams v. Browning*, 475.  
See COURT, ST. LOUIS CIRCUIT, 1. FRAUDS, STATUTE OF, 3. JUSTICES' COURTS.

## PRACTICE, CIVIL—ACTIONS.

1. *Practice, civil—Actions—Replevin—Testimony as to value of property—Dismissal of suit, when allowed.*—Plaintiff in a replevin suit will not be allowed to dismiss his suit before the hearing of testimony as to the value of the property delivered to plaintiff. (*Berghoff v. Heckwolf*, 26 Mo. 512.)—*Ranney, Adm'r of Walls, v. Thomas*, 111.
2. *Practice, civil—Actions—Replevin—Administrator, judgment against, how levied.*—Where the plaintiff brings suit in replevin as administrator, and

## PRACTICE, CIVIL—ACTIONS—(Continued.)

judgment is rendered against him, it should be entered against him in his official character, to be levied out of the testator or intestate.—*Id.*

3. *Replevin — Dismissal — Suit on return bond — Damages — Justice's court.*—When the complainant in a replevin suit fails to prosecute the same to a successful issue, that failure constitutes a breach of the condition of his return bond, and warrants a suit upon it, although there may have been no judgment in the replevin suit either for damages or a return of the property; and this is true whether the suit originated before a justice or the Circuit Court.—*Elliott v. Black*, 372.
4. *Replevin — Justice's court — Frame building — Jurisdiction.*—An action in replevin before a justice of the peace for the recovery of a "frame building" is not bad on its face for want of jurisdiction. Whether the building was attached to the realty and constituted a part of it, so as to be the subject of an action in ejectment, or was a mere personal chattel, was a point to be settled by the evidence.—*Id.*

See EJECTMENT, 5. INSURANCE, 1. LANDLORD AND TENANT. PRACTICE, CIVIL, 5, 6.

## PRACTICE, CIVIL—APPEAL.

1. *Practice, civil — Evidence — Verdict — Instructions.*—When there is any evidence to sustain a verdict, the Supreme Court will not interfere.—*McPheeters Hann. and St. Jo. R.R. Co.*, 22.
2. *Practice, civil — Appeal to District Court — Bond — Mandamus — Writ of error.*—The Cape Girardeau Court of Common Pleas granted an appeal to the Second District Court, with the proviso that no transcript should be made out until the filing of the bond. *Held*, that such proviso was unwarranted; but the clerk, acting under the direction of the court, properly refused to issue the transcript in default of bond, and *mandamus* would not lie against him to compel its issue. The proper remedy of appellant in such case would be writ of error.—*State ex rel. Benne v. Englemann*, 27.
3. *Practice, civil — Assignment of errors — Judgment affirmed, when.*—When plaintiff in error neglects to file an assignment of errors, and no cause for the omission is shown, the judgment of the court below will be affirmed.—*Myers v. Evens*, 32.
4. *Practice, civil — Supreme Court — Judgment affirmed, when.*—Where respondent presents to the Supreme Court a transcript of the record, and it appears therefrom that the appeal was taken more than thirty days before the commencement of the term, and no steps have been taken to prosecute the appeal, the judgment of the lower court will, on motion, be affirmed.—*State v. Macklin*, 33.
5. *Practice, civil — Supreme Court — Failure to prosecute appeal — Judgment affirmed, when.*—Where respondent presents in the Supreme Court a perfect transcript of the record, and it appears therefrom that the appeal was taken more than thirty days before the commencement of the term, and that no steps have been taken to prosecute the appeal, the judgment of the lower court will, on motion, be affirmed. (See Gen. Stat. 1865, ch. 135, §§ 29, 46, and p. 890, § 17.)—*International Mutual Live Stock Ins. Co. v. Lang*, 41.
6. *Certiorari will not lie, except to review judicial proceedings.*—The action of a County Court in subscribing to railroad stock and issuing bonds for pay-

## PRACTICE, CIVIL—APPEAL—(Continued.)

- ment thereof is a discretionary and not a judicial proceeding, and therefore not the subject of review by writ of *certiorari* from the Supreme Court.—*In re Saline Co. Subscription*, 52.
7. *Partnership—Weight of testimony not passed on by Supreme Court.*—In suit to recover a moiety of partnership assets, this court will not pass on the question of the weight of testimony.—*Gillespie v. Early*, 159.
  8. *Practice, civil—Instructions—Evidence not weighed by Supreme Court.*—In trials at law, this court will not attempt to weigh evidence. But when there is a complete failure of evidence, this court will intervene to prevent injustice being done.—*Routson v. Pacific R.R.*, 236.
  9. *Practice, civil—Bill of exceptions should state that it contains all the evidence.*—A bill of exceptions is defective in not stating that it contains all the evidence which was given in the cause.—*Id.*
  10. *Practice, civil—Testimony—General exceptions to, not sufficient.*—General exceptions to all testimony will not be re-examined in the Supreme Court.—*Gillette v. Mathews*, 307.
  11. *Practice, civil—Bill of exceptions must show that all the evidence is included.*—A bill of exceptions need not, in words, state that it contains all the evidence, if, from the whole record, such is plainly the fact.—*Merchants' Bank v. Ward's Adm'r*, 310.
  12. *Practice, civil—Supreme Court—Exceptions must be saved below.*—When no exceptions are taken to the rulings of the court below, they will not be considered on appeal to this court.—*Jameson v. The State and Webster County*, 332.
  13. *Questions of fact for the jury.*—Questions whether witnesses swear falsely, or what credit is to be attached to evidence, or how far it is contradictory, are solely for the jury in trials at law, and will not be considered in the Supreme Court.—*Bonnell v. U. S. Express Co.*, 422.
  14. *Appeals without merit—Damages.*—When appeals are without merit, ten per cent. damages may be awarded.—*Id.*
  15. *Damages.*—On appeals without merit, ten per cent. damages may be awarded.—*Kelley v. U. S. Express Co.*, 428.
  16. *Practice, civil—Supreme Court—Appeal dismissed, when—Statement and points not filed.*—When appellant files no statement of the case, or points intended to be insisted upon in the argument, the appeal will be dismissed.—*Ford v. Winters*, 448.
  17. *Supreme Court—Damages—Ten per cent. allowed, when.*—When the record plainly shows that the appeal was taken for delay, and is destitute of merit, the judgment will be affirmed, with ten per cent. damages.—*Banister v. Henn*, 567.
  18. *Practice, civil—Supreme Court—Objection made for first time comes too late.*—An objection to the sufficiency of a petition, made in the Supreme Court for the first time, comes too late.—*Reed v. Robertson*, 580.

See COURTS, COUNTY, 10, 11. ELECTIONS, 3. JUSTICES' COURTS, 1, 2.  
PRACTICE, CIVIL—JUDGMENTS, 1. PLEADINGS, 4. TRIALS, 6.

## PRACTICE, CIVIL—JUDGMENT.

1. *Practice, civil—Judgment—Exceptions, when to be taken.*—When no exception was taken to the acts or rulings of court prior to judgment, it is too

PRACTICE, CIVIL—JUDGMENT—(Continued.)

late to initiate objections to such acts or rulings afterward.—*Ranney, Adm'r of Walls, v. Thomas, 111.*

2. *Practice, civil—Actions—Replevin—Administrator, judgment against, how levied.*—Where plaintiff brings suit in replevin as administrator, and judgment is rendered against him, it should be entered against him in his official character, to be levied out of the testator or intestate.—*Id.*
3. *Practice, civil—Decree, interlocutory—Power of court to set aside.*—Suit was brought to set aside the forfeiture of certain leases, and for an account of the rents, profits, etc. The court issued a decree entitling plaintiff to redeem the premises on payment to defendant of an amount to be ascertained by a referee, and ordered an account to be taken for that purpose. *Held*, that the decree was not final, but interlocutory, and subject to the control of the court so long as the case properly remained upon its docket awaiting final action, and that it had power, at a subsequent term, to make an order vacating the decree; and, further, that affidavits showing the decree to have been issued without notice, trial, or consent, made a case calling for the exercise of that power.—*Dieckhart v. Rutgers, 132.*
4. *Equity—Relief—Jurisdiction—Judgments, when not impeachable collaterally.*—A judgment, though informal, even to the extent of granting a relief not contemplated by the petition, when parties are before the court and the relief is within its jurisdiction, is not a void proceeding, and can not be impeached collaterally.—*O'Reilly v. Nicholson, 160.*
5. *Clerical errors—Judgments nunc pro tunc—When may be entered.*—Where the clerk of a court fails to enter judgment, or enters up the wrong judgment, there is no doubt about the existence of power in the court to correct the matter, and order the proper entries to be made at any time. The court may always at subsequent terms set right mere forms in its judgments, or correct misprisions of its clerks, or any mere clerical errors, so as to conform the record to the truth. But when the court has omitted to make an order which it might or ought to have made, it can not at a subsequent term be made *nunc pro tunc*. In all cases in which an entry *nunc pro tunc* is made, the record should show the facts which authorize the entry.—*Gibson v. Chouteau's Heirs.*
6. *Administrator, bond of—Suit on—Allegation—Breaches—Verdict, arrest of.*—In a suit on an administrator's bond, where the petitioner sets out several distinct breaches, a verdict for an entire and gross sum is erroneous, and furnishes a sufficient ground for arrest of judgment, on motion.—*State ex rel. Collins v. Dulle, 269.*
7. *Judgment—Infants—Guardian ad litem—Void and voidable judgment.* A judgment against an infant, who appears by attorney and not by guardian, although irregular and reversible on error, is merely voidable, and not absolutely void, so as to enable defendant to successfully resist a subsequent action upon it.—*Townsend, Adm'r, v. Cox, 401.*

See EQUITY, 6, 12. PRACTICE, CIVIL, 1

PRACTICE, CIVIL—PARTIES.

1. *Administrator de bonis non—Must sue for the assets—Creditors can not sue for them.*—When an administrator dies, the administrator *de bonis non* is the proper person to sue for the assets belonging to the estate, and a creditor of the estate will not be permitted to sue for his entire debt on the bond of the

**PRACTICE, CIVIL—PARTIES—(Continued.)**

deceased administrator. Such a course would lead to confusion, and destroy and practically annul the statutory provision concerning priorities and classifications.—*State ex rel. Collins v. Dulle*, 269.

2. *Damages—Suit for, under statute—Father and mother as plaintiffs, divorce of.*—In suit for damages under section 2, p. 520, Wagn. Stat., the father and mother of the deceased child may join as plaintiffs, although divorced prior to the accrument of the cause of action.—*Buel v. St. Louis Transfer Co.*, 562.

**PRACTICE, CIVIL—PLEADINGS.**

1. *Damages—Railroad companies—Cow, killing of—Petition—Allegation of negligence, sufficiency of.*—In a suit for damages against a railroad company for killing a cow, the allegation that the act was done carelessly and negligently was sufficient, and showed a good cause of action.—*McPheeters v. Hann. and St. Jo. R.R. Co.*, 22.
2. *Practice, civil—Pleadings—Statute, how pleaded—Objections must be made in court below.*—It is only necessary for a party wishing to avail himself of a statute to state facts which bring his case within its provisions (Wagn. Stat. 1020, § 41), although according to the rules of good pleading he ought to refer to it. But all the circumstances essential to support the action must be alleged, or in substance appear on the face of the petition. If the matter were defectively stated therein, objection should be raised in the court below; otherwise it can not be entertained.—*Kennayde v. Pacific R.R. Co.*, 255.
3. *Practice, civil—Pleadings—Objections to petition—What can not be made by motion in arrest.*—An objection to a petition for misjoinder of counts, or a union of several causes in one count, if not made by demurrer or motion to strike out, will be deemed to have been waived (Wagn. Stat. 1015, § 10), and can not be raised by motion in arrest of judgment. (*Hoagland v. Hann. and St. Jo. R.R. Co.*, 39 Mo. 451, overruled.)—*House v. Lowell*, 381.
4. *Practice, civil—Failure to file replication—Objection on account of, not considered unless raised in lower court.*—When the answer sets up new matter, and no replication is filed, defendant should move for judgment on the pleadings; and if no objection is taken or point raised as to any insufficiency or defectiveness in the court below, they will not afterward be considered in the Supreme Court.—*Smith v. City of St. Joseph*, 449.
5. *Practice, civil—Petition—Amendment, when relates back—Limitations.*—Where an amendment to a petition in a suit for damages (Wagn. Stat. 519, § 2) sets up no new matter or claim, but is merely a variation of the allegations affecting a demand already in issue—as where, by the original petition, a party was assigned to the wrong side of the cause, and the mistake was corrected—it relates to the commencement of the suit, and the running of the statute is arrested at that point.—*Buel v. St. Louis Transfer Co.*, 562.

SEE BILLS AND NOTES, 16. CORPORATIONS, 7. EQUITY, 20. INSURANCE,

1. PRACTICE, CIVIL, 5, 6.

**PRACTICE, CIVIL—TRIALS.**

1. *Practice, civil—Evidence—Verdict—Instructions.*—When there is any evidence to sustain a verdict, the Supreme Court will not interfere.—*McPheeters v. Hann. and St. Jo. R.R. Co.*, 22.
2. *Practice, civil—Instructions offered out of time, properly refused.*—An instruction offered by counsel, after the commencement of the argument to the jury, is properly refused by the court.—*Id.*



## PRACTICE, CIVIL—TRIALS—(Continued.)

3. *Practice, civil—Instructions—Term “gross,” when should be used in.*—An instruction using the term “gross” should not be given without some explanation of its import, especially without some testimony upon which to found it.—*Mueller v. Putnam Fire Insurance Co.*, 84.
4. *Practice, civil—Trial—Instructions neither given nor refused, effect of.*—An instruction was asked by defendant, at the conclusion of plaintiff's case, to the effect that plaintiff was not entitled to recover on the proofs. The court took no action on the instruction, but the trial proceeded, and defendant put in his evidence. *Held*, that the instruction was practically refused.—*Vasatine, Public Adm'r, v. Wilding*, 89.
5. *Practice, civil—Trial—Instructions not warranted by evidence, not given.*—It is misdirection and wrong practice to give instructions, no matter how correct they may be abstractly, if the evidence in the particular case does not warrant or justify them.—*Franz v. Hilterbrand*, 121.
6. *Practice, civil—Trial—Instructions—Evidence.*—In trials at law, the Supreme Court will not weigh conflicting evidence.—*Meyer v. Pacific R.R. Co.*, 137.
7. *Practice, civil—Trial—Instructions—Singling out specific acts, etc., not permissible.*—The practice of singling out in instructions specific acts, and asking the court to say, as a matter of law, that if these acts were established there could be no recovery, is not permissible.—*Id.*
8. *New trial—Newly-discovered evidence.*—The granting of a new trial on the ground of newly-discovered evidence is a matter resting in the sound discretion of the judge trying the case.—*Merchants' and Manufacturers' Insurance Co. v. Curran*, 142.
9. *Practice, civil—Instructions—Evidence—Account, note given in payment of—Receipt—Jury.*—In a suit on an account, the mere acceptance by the plaintiff of notes given by defendant for the debt, and the giving of a receipt for the amount due, without further proof, does not constitute such evidence of payment as to warrant the court in sending the case to the jury.—*Doebeling v. Loos*, 150.
10. *Practice, civil—Jury, separation of, will not invalidate a verdict, when.*—It is the well-settled doctrine in this State that the separation of a jury in a criminal case will not invalidate a verdict or furnish grounds for a new trial, there being no ground to suspect that they have been tampered with or that they have acted improperly.—*State v. Brannon*, 329.
11. *Practice, civil—Instructions directing a verdict on a certain state of facts, must embrace all.*—An instruction which hypothecates a state of facts, and upon their existence directs a verdict, is improper unless all the facts are hypothecated which are necessary to sustain a verdict.—*Thomas v. Babb*, 384.
12. *Practice, civil—Instructions, requisites of.*—Each instruction must be correct in itself; all must be consistent with each other; and the whole taken together must present but one doctrine.—*Id.*
13. *Practice, civil—Weight of evidence, verdict of jury considered as to.*—In trials at law, juries are the proper judges as to the weight of evidence, and their verdicts on that issue are conclusive on the Supreme Court.—*Bradford v. Rudolph*, 426.
14. *Question of credibility for jury.*—The jury are the sole judges of the credibility of witnesses.—*Kelly v. United States Express Co.*, 428.



## PRACTICE, CIVIL—TRIALS—(Continued.)

15. *Practice, civil—Verdict—Weight of evidence.*—The rule that an appellate court should not disturb a verdict when there is evidence to sustain it, will not prevent the reversal of a cause when the verdict of the jury must of necessity have been for a smaller sum than the one in the record.—*Fury v. Merriman*, 500.

16. *Damages—Instruction—Phrase “undue carelessness.”*—In an action for damages, the phrase “undue carelessness,” in an instruction concerning negligence, is calculated to confuse and mislead the jury, and is proper ground for a reversal.—*Buel v. St. Louis Transfer Co.*, 562.

See *BILLS AND NOTES*, 2, 16. *EVIDENCE*, 3. *LANDLORD AND TENANT*, 9. *PRACTICE, CIVIL—APPEALS*, 13.

## PRACTICE, CRIMINAL.

1. *Practice, criminal—Oral instructions, parties can not consent to.*—The statute (Gen. Stat. 1865, ch. 213, § 30) does not authorize the judge of a Criminal Court, even at the request or by consent of parties, to give oral instructions as to matters of law. It would be incompetent for the prisoner himself to consent to such waiver of the statutory requirement, and, *a fortiori*, his counsel can have no such right.—*State v. Cooper*, 64.

2. *Practice, criminal—Costs, exemption from payment of—Law relating to, in United States.*—The only feature of the English law relating to the exemption of poor persons from liability to pay costs, adopted in the criminal practice of the United States, is the obligation of the court to assign counsel for such accused persons as are unable to employ any.—*State ex rel. Miller v. Dailey*, 153.

3. *Practice, criminal—Appeal—Transcript—Clerk must make out transcript, although costs are unpaid.*—The duty (under Gen. Stat. 1865, ch. 215, § 16) of sending up a proper transcript, upon *supersedeas* in a criminal prosecution, is imperative, and is personal to the clerk, without the application of the accused; and for the performance of this duty the law imposes upon no one the obligation of advancing the fees.—*Id.*

4. *Crimes and punishments—Passing forged checks—Evidence—Handwriting Comparison.*—In an action for passing a counterfeit or forged bank check, where the signature and indorsement were positively proved, and no other papers were introduced in evidence for the purpose of admitting testimony by comparison, it was competent to submit the whole paper to the jury, with or without the aid of experts, for them to form their own conclusion as to whether the whole instrument thereon was produced by one and the same hand.—*State v. Scott*, 302.

5. *Practice, criminal—Trial—Re-trial at same term where no verdict.*—A prisoner may be again put on trial at the same term where the first trial has not resulted in a verdict.—*Id.*

*Practice, criminal—Convictions—Sentences—Terms of imprisonment—Construction of statute.*—On the same day a prisoner was convicted and sentenced under two indictments. The sentences were pronounced after the verdicts in both cases had been rendered. The terms of imprisonment were, respectively, three and two years, but the day when they were to begin was not specified. *Held*, that the statute (Wagn. Stat. 513, § 9), without the aid of such specification, makes the second term commence on the expiration of the first; and *habeas corpus* for his discharge at the end of the first term, on the

## PRACTICE, CRIMINAL—(Continued.)

ground that the second and shorter term had already elapsed, will be denied.

—*Ex parte* Turner, 331.

7. *Crimes and punishments—Indictment—Peddlers' goods, etc., not the produce of this State—Burden of proof.*—In an indictment brought under the act concerning peddlers (Wagn. Stat. 979, § 1), the proof not being peculiarly within the knowledge of defendant, it devolves upon the State, in order to insure conviction, to prove that the goods, wares, and merchandise sold were not the growth, produce, or manufacture of this State. In such case full and plenary proof is not required, but sufficient to make out a *prima facie* case will be necessary.—*State v. Hirsch*, 429.
8. *Practice, criminal—Trials—Jurisdiction, question of, always open for examination.*—Questions going to the jurisdiction of the court over the cause of action, or subject-matter of the complaint, are in order at any stage of the proceedings in a case.—*State v. Lawrence*, 492.
9. *Practice, criminal—Jurisdiction—Court of Criminal Correction—Executions issued by a justice for purpose of extortion.*—Forfeiture of office, and a disqualification to hold office and vote, were designed by the Legislature as part of the "punishment" to be visited on one convicted of illegally issuing an execution for purposes of extortion, under color of office as justice of the peace. (Gen. Stat. 1865, ch. 204, §§ 16, 19.) But the St. Louis Court of Criminal Correction, prior to the amendment of 1869 (Sess. Acts 1869, p. 196, § 13), had no jurisdiction over misdemeanors where the punishment following conviction went beyond a fine and imprisonment, and therefore had no jurisdiction of such a complaint.—*Id.*
10. *Husband and wife—Neglect to "maintain or provide"—Words sufficient under statute.*—Under the act of 1867, p. 112, section 1, a complaint which charged that the defendant abandoned his wife, and failed to maintain or provide for her, is sufficient. The words "maintain and provide," as used in the statute, mean simply a provision of maintenance, the neglect of which, after abandonment, completes the offense defined.—*State v. Larger*, 510.
11. *Misdemeanors, trial of—Jury—Waiver.*—In misdemeanor cases, the statute does not require any express waiver of a jury in order to authorize a trial by the court. If defendant was not willing to be tried by the court, he should have objected at the time; and in such cases, as it is not required that the submission shall be entered on the minutes, or in any manner become a matter of record, it is not to be presumed from the silence of the record that the court proceeded irregularly and without authority.—*Id.*
12. *Husband and wife—Action charging husband with refusal to maintain wife, etc.*—In an information by the wife charging her husband with abandoning her without good cause, and refusing to maintain and provide for her, the question put to a witness, whether defendant had not rented of him a house which plaintiff refused to occupy, was proper, and should have been allowed.—*State v. White*, 512

See MERCHANTS.

## PRACTICE—SUPREME COURT.

See CIRCUIT ATTORNEYS, 1. PRACTICE, CIVIL—APPEAL. QUO WARRANTO, 1, 2, 3

## PRESBYTERIAN CHURCH.

1. *Quo warranto*—*Lindenwood College—General Assembly*—"Declaration and Testimony" signers.—The charter of Lindenwood Female College provided that vacancies in its board of trustees should be filled by the presbytery which was "connected with the General Assembly of the Presbyterian Church in the United States of America, usually styled 'Old School.'" By resolution passed in May, 1866, the General Assembly resolved that if any presbytery should enroll one or more signers of a paper known as "The Declaration and Testimony," that presbytery should, *ipso facto*, be dissolved, and that its ministers and elders adhering to the General Assembly were authorized to take charge of the presbyterial records, to retain the same, and to exercise all the authority and functions of the original presbytery until the next meeting of the General Assembly. In pursuance of this resolution, the Presbytery of St. Louis was, by one of its members, pronounced dissolved, in September, 1866, for enrolling a signer of that paper. *Held*, that a presbytery so dissolved had no power to appoint trustees of Lindenwood College; and that, on proceedings in *quo warranto* against such trustees, they were properly ousted in favor of others, appointed by a body composed of members of that presbytery adhering to the General Assembly.—*State ex rel. Watson v. Farris*, 183.
2. *Ecclesiastical law*—*Old School Presbyterian General Assembly, powers of*.—The General Assembly of the Presbyterian Church, commonly known as "Old School," possesses the unlimited control of superintending the concerns of the whole church, and of suppressing schismatical contentions and disputations. It combines within itself all the branches which constitute the elements of a complete government, namely, executive, legislative, and judicial; and acts upon all subjects coming before it according as they belong to each or either of these departments. It possesses extensive original and appellate jurisdiction, and whether a case is regularly or irregularly before it is a subject for it to determine for itself; and no civil court can revise, modify, or impair its action in a matter of merely ecclesiastical concern.—*Id.*

## PROCESS.

See ATTACHMENT, 1. PRACTICE, CIVIL, 2, 3. SHERIFF, 1, 2.

## PROHIBITION, WRIT OF.

See COURTS, COUNTY, 8. JURISDICTION, 5.

## PUBLICATION, ORDER OF.

See ATTACHMENT, 1. PRACTICE, CIVIL, 2.

## Q.

## QUO WARRANTO.

1. *Quo warranto*—*Proceedings in, by attorney-general, do not settle title of claimant to office*.—In case of information by the attorney-general in behalf of the State, against one holding an office, the private rights of a third party claiming it are not determined. When a private person wishes to have his right to an office adjudicated, the information should be prosecuted at his relation and proceeded upon as in *quo warranto*. (Wagn. Stat. 1133, § 2.)—*Hunter v. Chandler*, 452.
2. *Quo warranto should not be brought before Supreme Court, except, etc.*—Except in peculiar cases, the Supreme Court will refuse to allow an informa-

## QUO WARRANTO—(Continued.)

tion to be filed before it to inquire into the title of a private person to an office. Parties should, in general, resort in such cases to the Circuit Court.—*Id.*

3. *Quo warranto commenced prior to resignation, prosecuted afterward—Suit for fees after expiration of term, etc.*—The resignation of an officer or expiration of his term will not prevent an information to test his title, if commenced prior thereto, from being afterward prosecuted to final judgment; and *semble*, that suit for money had and received during his term will lie against him, although commenced after resignation or expiration of term; provided, that plaintiff had been once in possession, and had been unlawfully ousted. But when the title is in doubt, proceedings in *quo warranto* must be first had to settle that issue.—*Id.*

See COURTS, COUNTY, 2. ELECTIONS, 4. OFFICERS, 3. PRESBYTERIAN CHURCH.

## R

## RAILROADS.

1. *Corporations — Railroads — Subscriptions to, vote upon — Definite amount of stock must be voted for.*—The law authorizing the Saline County Court to subscribe stock in the Lexington and St. Louis Railroad Company, expressly provided that the subscription should not be made unless a majority of the tax-payers should vote for it, "specifying the amount." The order of the County Court submitting the question to the people, called on them to vote for or against an amount "not exceeding \$70,000," leaving the precise amount undetermined. The entry in the records of the County Court, subsequent to the vote, declared that the election resulted "in favor of levying a tax of \$70,000, to subscribe the same to the capital stock of the Lexington and St. Louis Railroad." In *mandamus* against the court to compel the issue of the bonds, and levy of tax for their payment, *held*, that such entry was not a conclusive finding of the court of the fact that the tax-payers voted to subscribe the specific sum of \$70,000, but that, under a fair interpretation of the record, it showed merely that the question submitted had received a majority of the votes. The bonds of a county can be made valid only by a substantial compliance with the law that authorizes their issue; and the failure of voters to specify their amount, in the case at bar, rendered bonds issued in pursuance of such vote invalid.—*State ex rel. Lexington and St. Louis R.R. Co. v. Saline county OOourt*, 242.
2. *Corporations — Railroads — Agreement to locate depot in consideration of donation of lands, void when.*—A. agreed with the Pacific Railroad Company to deed it a certain lot of ground for purposes of speculation, in consideration that the company would locate a freight and passenger depot on his land. There was no evidence that the land was to be used for the general business of locating, constructing, managing, and using the road. *Held*, that although in one sense the company was a private corporation, yet its chartered privileges were granted, in part, to subserve great public interests; that such an agreement might be superinduced by prospects of mere gain, and thus the general welfare and good of the public might be sacrificed to subserve mere

## RAILROADS—(Continued.)

private interest; that for this reason such an agreement was void against public policy.—*Pacific R.R. Co. v. Seeley*, 212.

3. *Corporations — Railroads — Power to hold land, governed by its charter.*—The charter of the Pacific Railroad Company gave it power to acquire a strip of land not exceeding one hundred feet wide for a right of way, and to hold sufficient ground for the erection and maintenance of depots, landing places, etc. *Held*, that the corporation had no power to acquire land for purposes of speculation. A corporation can purchase and hold land only for such purposes as are authorized by its charter.—*Id.*
4. *Damages — Railroads — Accident policies — General accident tickets — Vexatious delay.*—An engineer killed on a railroad locomotive had previously purchased a ticket issued by the Railway Passengers' Assurance Company, which, by its terms, insured against death "caused by accident while traveling by public or private conveyance provided for the transportation of passengers." Suit being brought by his legal representatives on the policy, the proof showed that defendant was selling two classes of tickets, one known as the "travelers' risk," the other as the "general accident," the latter being sold for the highest price; that deceased purchased the latter; that at the time of the purchase defendant's agent knew him to be an engineer, and had no instructions not to sell to railroad employees. *Held*, that deceased was insured against all accidents, without regard to the capacity in which he was acting; that the ticket was intended to cover the accident by which he met his death; and that defendant was liable. *Held, also*, that it was the duty of defendant to pay upon notification of the death of deceased, and, on its refusal to comply, interest was thenceforth payable.—*Brown v. Railway Passengers' Assurance Co.*, 221.
5. *Ejectment — Railroad lands — Congressional grant — Filing map of land in county records.*—In case of suit in ejectment by the Hannibal and St. Joseph Railroad Company, under the act of Congress of June 10, 1852, and the Missouri statute of September 20, 1852 (R.R. Laws, p. 117), where no question was made as to the location of the road, nor was it questioned that the land sued for was included within the grant by Congress, nor was it urged that the land had been sold by the United States, or that any right of pre-emption had attached to it, nor was it disputed that plaintiff's proof made out a *prima facie* case—the mere non-recording in a given county of the map of lands taken by the railroad company in that county, as directed by the act of September 20, would not be fatal to plaintiff's recovery.—*Hann. and St. Jo. R.R. Co. v. Moore*, 443.

See DAMAGES, 1, 2, 4, 15, 16, 17, 18, 20. EMINENT DOMAIN, 1, 2.

## RECORD, UNITED STATES.

See LANDS AND LAND TITLES, 15.

## REPLEVIN.

1. *Replevin—Execution against copartnership effects, under judgment against insolvent partner — Replevin by solvent partner against sheriff's judgment, for value of property or return thereof.*—Defendant in a replevin suit claimed a lien on the replevied property as constable, by virtue of a levy upon it under a judgment against plaintiff's co-partner. The property was a portion of the partnership assets. In such a case the constable's interest in the property was



## REPLEVIN—(Continued.)

limited to the execution debtor's interest in the partnership effects, and plaintiff was entitled to show that the interest of the latter was merely nominal and of no value. In these suits, when plaintiff gives bond and takes the property, the jury should find a verdict for defendant for the value of his interest in the property, nominal damages and costs, or for a return of the property, at the election of defendant. (Wagn. Stat. 1026, § 12.) But plaintiff might, by paying off the amount of the lien, retain the property, and defendant would have no alternative but to accept the money if seasonably tendered.—*Gilham v. Kerone*, 489.

2. *Replevin—Profits and losses shown is no proof of ownership, etc.*—A. may have been the owner of, and entitled to the possession of; certain goods, notwithstanding that B. was interested in the profits of the sales. And in replevin for the goods against a sheriff, the jury were improperly instructed to find for defendant if, at the time of seizure, B. was owner of the property, or interested in the profits to be realized from the sale thereof.—*Rapp v. Vogel*, 524.
3. *Partnership property seized by creditor of one partner—Partners in interest ascertained.*—The interest of a partner is subject to seizure by his private creditors, and the measure of his interest can be determined in the trial of a replevin suit for the property.—*Id.*

See JUSTICES' COURTS, 5. PRACTICE, CIVIL—ACTIONS, 1, 2, 3, 4.

## RES ADJUDICATA.

1. *Courts, County, allowance of claim by—In what case not res adjudicata.*—The action of a County Court in allowing a claim of the county collector against the county, through a mistake of fact, is not *res adjudicata*, so as to bar a suit by the county to recover back the amount allowed. In such case the judges of the court acted merely as the fiscal agents of the county, and their mistake might be inquired into and corrected, as well as those of an individual acting in his own behalf.—*County of Marion v. Phillips*, 75.

## REVENUE.

1. *Land and land titles—Tax collector's deed—Title of State of Missouri—Of former purchaser—What title conveyed.*—A tax collector's deed which purports to convey to the purchaser "all the right, title, and estate" of the State of Missouri in and to the premises, and does not purport to convey anything more, can pass no title to the purchaser.—*Einstein v. Gay*, 62.
2. *Revenue—Real estate sold subsequent to first Monday in September—Taxes on, paid by whom—Lien of tax.*—State and county taxes constitute a lien on real estate from and after the first Monday in September, and the then owner will be liable to a subsequent purchaser for them, on his covenant of warranty, even though the sale is prior to the assessment. (*Blossom v. Van Court*, 34 Mo. 390; Gen. Stat. 1865, ch. 12, § 12.)—*McLaren v. Sheble*, 130.
3. *Equity—Taxes, lands sold for, redemption of—Ignorantia legis.*—Within the time allowed to redeem certain lands sold for taxes, the owner, having been in the military service, made tender, under the act of March 12, 1867, of the amount of the tax, with ten per cent. interest. This being refused, he filed his petition to enjoin the delivery to the purchaser of his tax deed. The court, after the proceeding had remained in court till after the time for redemption had expired, decided the act relied on to be unconstitutional and the claim of the owner to be invalid, but allowed him to add to his tender the amount required by the statute to redeem, although the time of redemption



## REVENUE—(Continued.)

had lapsed, and on payment of costs made the injunction perpetual. *Held*, that the rule *ignorantia legis*, etc., did not apply to such case, especially as the delay beyond the time of redemption was caused in part by the action of the court, and that equity in the premises properly relieved against such mistake of law.—*Harney v. Charles*, 157.

4. *Revenue—School taxes—Delinquent land list—Warrant for, made out on the county treasury.*—Under the act of 1868, concerning schools (Wagn. Stat. 1246-7, §§ 18-20), the justices of a County Court are bound to issue to the township clerk, on demand, for the use of the schools, a warrant on the county treasury for the amount of the delinquent list of land taxes due the sub-school districts, without waiting until they are collected and paid into the county treasury.—*Wallendorf v. The County Court of Cole County*, 228.
5. *State ex rel. Wallendorf v. Cole County Court, ante*, p. 228, affirmed.—*State ex rel. Sexton v. County Court of Cass County*, 230.

See LIMITATIONS, 3.

## RIGHT OF WAY.

See DAMAGES, 19.

## ROADS, COUNTY.

1. *County roads—Proceedings to obtain change of road must contain what.*—Persons wishing for a change in a county road can only apply for it, under the statute (Wagn. Stat. 1229, §§ 56-58), by a petition showing a wish to cultivate their land, by proof of notice, and procurement of written consent from the person upon whom they would turn the road. If they wish a new road, under sections 49 and 53, p. 1228, the width of the road should be fixed, and the "intermediate points" on the road should be specified, and the damage should be assessed by a jury before the proceedings were determined; and the assessment of damages in favor of one whose property was taken for the road, after the final action of the court, is altogether irregular, and creates no debt.—*Wilson v. Berkstresser*, 283.
2. *Mandamus—Jurisdiction of Circuit Courts by, over County Courts—Roads—Assessment of damages.*—In the matter of paying damages assessed for the right of way on a public road, Circuit Courts have jurisdiction over the County Court by *mandamus*, and in a proper case may issue the writ; and a writ of prohibition will not issue to prevent its erroneous exercise.—*Id.*
3. *County roads, petition for—Signatures of householders, proof concerning—Joint assessments.*—A petition for a new county road need not show on its face that twelve of its signers were householders, although this fact must be proved to the satisfaction of the court before any action can be taken upon the petition. But although this character of the signers does not appear in the records of the court, an order of court establishing the road will raise the presumption that it was proved, unless the contrary appears; and where the damages were assessed in favor of the petitioners, jointly, they will be presumed to have owned the land taken jointly, and not severally.—*Snoddy v. Pettis County*, 361.
4. *County roads—Orders for opening, under section 52, p. 1228, Wagn. Stat.—Defects in.*—An order for opening a county road, under section 52 of the act touching roads (Wagn. Stat. 1228), wherein it was adjudged "that the petitioners for said road pay the assessed damages and costs, and that the road be

## ROADS, COUNTY—(Continued.)

opened," was defective in not specifying the width of the road, in attempting to render judgment for damages against the petitioners, and in making an order for opening the road before the petitioners had paid "the amount of such damages into the county treasury."—*Id.*

## S

## ST. LOUIS, CITY OF.

1. *St. Louis, city of—Deposit of carcasses—Mayor.*—The city of St. Louis is not liable to the owner of property for damages caused by the deposit of dead mules on his premises, under an arrangement with the mayor. His action in such case was outside of his official duties, and could not bind the city.—*Hilsdorf v. City of St. Louis*, 94.
2. *St. Louis, city of—Removal of carcasses—Power of city over acts of contractors.*—The city of St. Louis had no power to control the action of persons employed under Art. IX of ordinance 4894, for the removal of dead animals, under their contract; and having no such power, they could not be responsible for such action.—*Id.*
3. *St. Louis, city of—Removal of carcasses—Responsibility of owner for.*—The fact that the city of St. Louis has made a contract for the removal of dead animals does not exonerate the owner from any responsibility in regard to them when that contract can not be or is not complied with; nor can the obligation he is under to let the contractor have the carcass, if he does not himself appropriate it within twelve hours, if the contractor shall come for it, be construed to discharge all responsibility on his part.—*Id.*

## ST. LOUIS COUNTY COURT.

See COURTS, COUNTY, 4.

## SALES.

1. *Sales—Delivery, constructive and actual—Lien of vendor.*—Where nothing is said at the time of purchase of goods about payment, the law presumes that the sale is for cash; and in such case payment and delivery are immediate and concurrent acts, and the vendor has the indisputable right to refuse to deliver without payment; and although the counting out and separation would amount to a constructive delivery, so as to vest title in the vendee and make the property at his risk, still actual delivery and change of possession could not be coerced until payment is made. There may be a delivery which will pass title, but while possession is retained the lien will not be destroyed. (*Southwestern F. & C. P. Co. v. Stanard*, 44 Mo. 71, affirmed.)—*Southwestern Freight and Cotton Press Co. v. Plant*, 517.
2. *Sales—Sub-vendee has no greater right than the vendee.*—A sub-vendee, or a third party to whom an order is given for the delivery of goods, has no rights greater than, or superior to, the person from whom he derives title. If the vendor had the possession or the right of detention for the unpaid purchase money, he would still retain that right notwithstanding the assignment or transfer.—*Id.*

See ADMINISTRATION, 4, 5, 6. BANKS AND BANKING, 3. CONTRACTS, 1, 4, 5. DISTRESS WARRANTS, 1, 2. EQUITY, 4, 5. SHERIFF, 4, 5.

## SCHOOLS.

See BANKS AND BANKING. CONSTITUTION, 1, 2, 3. MANDAMUS, 2, 3, 4. REVENUE, 4.

## SEIZIN.

See LANDLORD AND TENANT, 4, 6

## SHERIFF.

1. *Sheriff's return—Amendment, when granted.*—An amendment of a sheriff's return, made after judgment, can not be permitted when it has the effect of rendering the judgment erroneous; but an amendment in aid of the judgment, in furtherance of justice, is allowable.—*Stewart v. Stringer*, 113.
2. *Sheriff's return—Amendment and vacation of, when permissible.*—Where an amendment to a sheriff's return, touching service of summons on defendant, was allowed and vacated at the same term of court, and long after judgment and sale thereunder, and the making and vacation of the amendment left the status of the parties unchanged, the court had power to order the vacation.—*Id.*
3. *Sheriff—Commissioner required to give bond—Failure to give—Liability of on bond—Statute of limitations.*—An ex-county sheriff was appointed by the Circuit Court commissioner to loan out, for the benefit of a widow, certain money belonging to her which he had held for her in his capacity as sheriff; and, as such commissioner, was directed to give bond, which he failed to do. In suit on his bond as sheriff, by the widow's heirs, for the money, *held*, that he was appointed commissioner on certain conditions which were not performed, and hence, that the appointment never took place; and that he became liable for the amount on his bond as sheriff; further, that his liability commenced immediately on the death of the widow, and was not barred till the lapse of three years thereafter.—*State, to use of Graham, v. Peacock, Adm'r*, 263.
4. *Sales—Sheriff's, at Circuit Court-house door, during session, are valid, etc.*—Judgment was obtained in the Common Pleas Court of Cass county, while in session at Pleasant Hill, and execution was issued therefrom. But the sale by the sheriff was made at the court-house door of the Circuit Court, at Harrisonville, the county seat, during a term of the Circuit Court, and not at the place where the Common Pleas Court was held, nor during a session thereof. *Held*, that, under the statute concerning judicial sales (*Wagn. Stat.* 609, § 42), such sale was valid.—*Mers v. Bell*, 333.
5. *Sheriff, sale by—Mistake as to date of, in return and recitals of deed.*—Land was advertised by the sheriff to be sold, and was in fact sold, on the 5th day of January. But the sheriff's return, and his recitals in the deed to the purchaser, declared the sale to have been on the "4th" of January. *Held*, 1st, that the mistake in the return as to the day of sale was not material, for the reason that it was not necessary to the validity of the purchase that the sheriff should make a correct return, or any return at all; and 2d, that the mistake as to the exact day of sale, occurring in the deed, was also immaterial, provided that the deed on its face was according to law, showing a sale at an authorized day during term of court.—*Buchanan v. Tracy*, 437.

See AGENCY, 3. DISTRESS WARRANT, 1. EJECTMENT, 4. EQUITY, 11. OFFICERS, 1, 2, 3, 5. REPLEVIN, 1.

## SLAVES.

See HUSBAND AND WIFE, 6.

## SPECIFIC PERFORMANCE.

See CONTRACTS, 1, 2, 5.

## STATUTE, CONSTRUCTION OF

See ADMINISTRATION, 3. ATTACHMENT, 1, 3. BANKS AND BANKING, 1, 2, 3. BILLS AND NOTES, 16. BONDS, MUNICIPAL, 1, 2, 3. CONSTITUTION. COURTS, COUNTY, 3, 7, 9. DAMAGES, 10, 11, 24, 25. DISTRESS WARRANT, 1, 2. ELECTIONS, 1, 2, 3, 4. EXECUTIONS, 1, 6. HUSBAND AND WIFE, 3, 4. INFANTS, 2. INSURANCE, 6. JUSTICES' COURTS, 9. LANDLORD AND TENANT, 3, 4, 9, 10. LIMITATIONS, 1. MECHANICS' LIENS, 1, 4, 5, 7. OFFICERS, 1, 2. PRACTICE, CIVIL, 2. PRACTICE, CIVIL—PARTIES, 2. PRACTICE, CIVIL—PLEADINGS, 2, 4, 5. PRACTICE, CRIMINAL, 1, 6, 7, 10. RAILROADS, 1, 4. ROADS, COUNTY, 1, 4. TRUSTS, 1.

## STOCKHOLDER.

See BANKS AND BANKING, 4. CORPORATIONS, 7.

## STREETS.

See DAMAGES, 22, 23.

## SUNDAY.

1. *Mechanics' liens—Four months expiring Sunday, lien must be filed Saturday.*—Under the mechanics' lien law (Wagn. Stat. 909, § 5), when the four months after the indebtedness accrued expired on Sunday, the lien is insufficient unless filed on the Saturday preceding. The act touching construction of statutes (Wagn. Stat. 888, § 6) must be construed in its restrictive sense, and, in the case supposed, both the first and last day must be excluded.—Patrick v. Faulke, 312.

## SURETIES.

1. *Bills and notes—Parties—Co-sureties.*—Parties to bills and notes who intend to become co-sureties should so agree, or should all be drawers merely; or the payee and indorser should also be drawers.—McCune v. Belt, 174.
2. *Bills and notes—Co-sureties—Equity—Indemnity of one inures to the benefit of all.*—It is a settled principle of equity that if one of several co-sureties subsequently takes a security from the principal for his own indemnity, it inures to the benefit of all the sureties, so far as they are co-sureties. But so far as he has a security for individual claims which he has against the same person, he is entitled to hold it.—*Id.*
3. *Bills and notes—Contribution—Suit for, by co-surety—Statute of limitations.*—In case of suit for contribution by a surety on a bill of exchange against his co-surety, the statute of limitations commences running against his claim from and after the day on which he paid the original judgment on the bill, and not from the time when the bill was dated; and his claim is not operated on by the limitation of ten years, but by that of five.—Singleton v. Townsend, 374.

See BILLS AND NOTES, 6, 17. DISTRESS WARRANT, 1.

## T

## TAXES

See REVENUE.

## TAX TITLES.

See LANDS AND LAND TITLES, 1

## TIME, COMPUTATION OF.

See SUNDAY.

## TOWNS.

See DAMAGES, 2. COURTS, COUNTY, 1, 2, 3.

## TRADE-MARKS.

1. *Trade-marks, injunction against use of—What imitation will justify, etc.*

—To justify an injunction against a defendant from the use of a certain brand as an alleged counterfeit or imitation of that of plaintiff, it should at least appear that the resemblance between the two brands was sufficiently close to raise the probability of mistake on the part of the public, or design and purpose to mislead and deceive on the part of the defendant.—*McCartney v. Garnhart*, 593

## TRANSCRIPT.

See JUSTICES' COURTS, 1. PRACTICE, CIVIL—APPEAL, 2. PRACTICE, CRIMINAL, 3.

## TRESPASS.

See DAMAGES. EQUITY, 16, 17, 18.

## TRUSTS.

1. *Trusts—Trustee's sale—Purchaser, auctioneer not agent for.*—When, at an auction sale under a deed on trust, the trustee acts as his own auctioneer, he can not bind the purchaser by a memorandum of the sale made by himself, so as to hold him liable, within the meaning of the statute of frauds (Wagn. Stat. 656, § 5). Although acting as auctioneer, he is a party to the sale, with natural interest and bias adverse to the purchaser; and the circumstance that he has no beneficial interest in the subject of the sale settles nothing as to his bias.—*Tull v. David*, 444.

See ADMINISTRATION, 4, 5. EJECTMENT, 5. MORTGAGES AND DEEDS OF TRUST.

## V

## VACANCY IN OFFICE.

See OFFICERS, 3.

## VERDICT.

See ADMINISTRATION, 1. PRACTICE, CIVIL—TRIALS.

## W

## WILLS

See CONVEYANCES, 2.

## WITNESSES.

See PRACTICE, CIVIL—APPEAL, 13, 15.

